

***United States Court of Appeals
for the Second Circuit***



APPENDIX

NO. 77-6175

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORMAN BIRNBAUM, ET AL.,

Plaintiffs-Appellees,

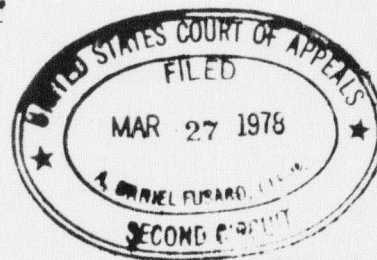
v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX



PAGINATION AS IN ORIGINAL COPY

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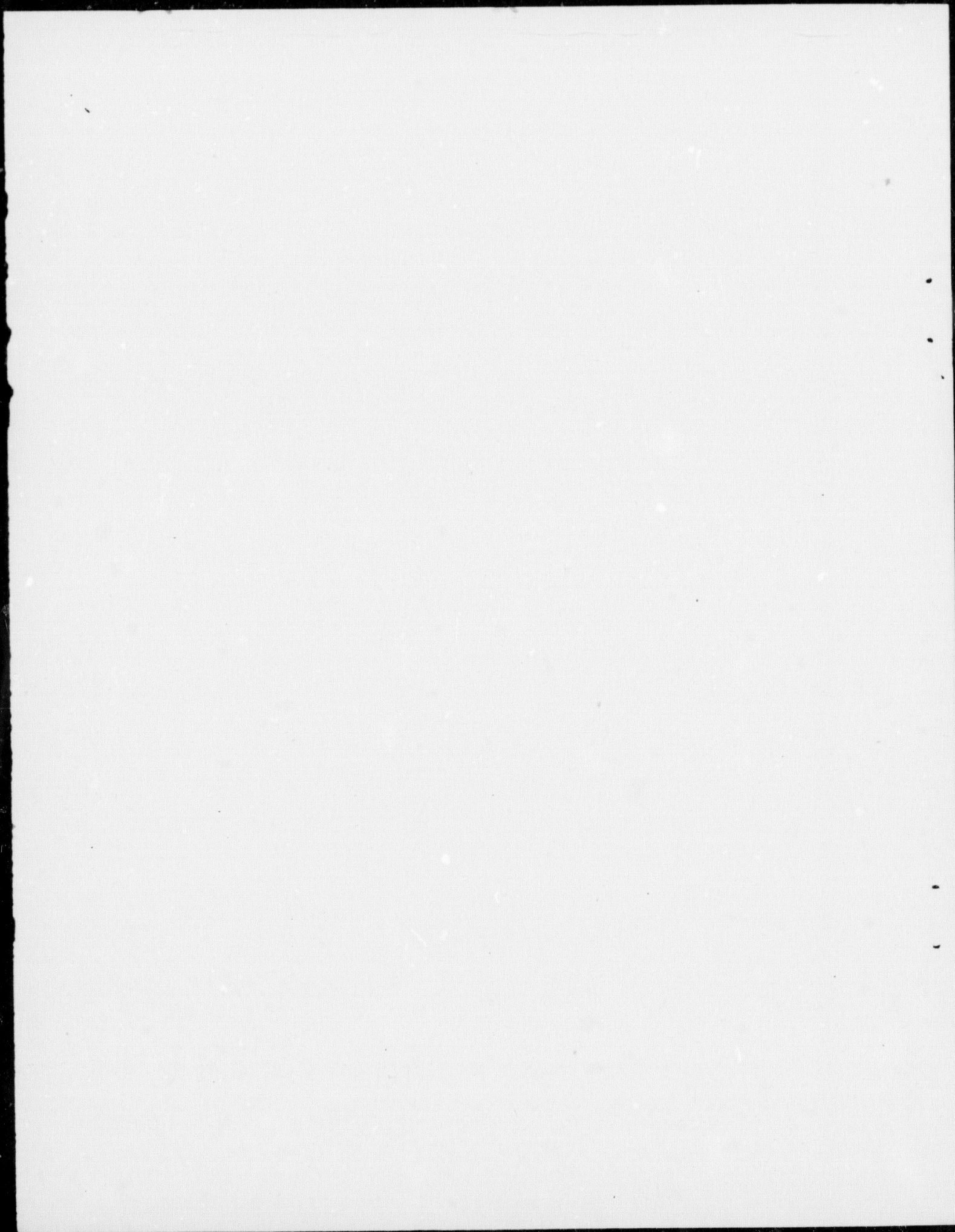
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77C 234--

B. Leonard Avery

vs

USA

DATE	NR.	PROCEEDINGS	
3/31/77		Transferral of case from USDC/District of Minnesota filed.	(1)
-9-77		By WEINSTEIN, J-Order referring the case to the Magistrate filed.	
		Copy mailed.	(2)
/11/77		BY WEINSTEIN, J. PRETRIAL ORDER dtd 3/10/77 conference to be held on 3/22/77 filed. <i>lg.</i>	(3)
3/14/77		APPEARANCE of attorney for plttf. entered, filed.	(4) <i>lg.</i>
22/77		Before Weinstein, J--case called- pre-trial conf held & concluded-all discovery to be completed within 30 days-govts motion to dismiss is denied-all pleadings & motion papers in Birnbaum are deemed to be pleadings in Avery-77C 234 & 76C 1837 are consolidated for purpose of trial case assigned to Mag for purposes of discovery-trial set for 5/6/77.---	
-22/77		By Weinstein, J Order dtd 3/22/77 filed re civil pre-trial order for 5/6/77.	(5)
22/77		By Weinstein, J Order dtd 3/22/77 filed re referral case to U.S. Mag parties notified.	(6)
28/77		Def's Interrogatories to plttf and def's request for production of documents. filed.	(7) <i>lg.</i>
8/77		Before CHREIN, U.S. Magistrate . Case called. Conference adj.to 4/7/77 . <i>lg.</i>	
/77		Def's interrogatories to plttf . filed.	(8) <i>lg.</i>
7/77		Answer of deft filed.	(9) <i>lg.</i>
7/77		Before Chrein, Mag--conf adjd to 4/22/77.	
22/77		Letter of John T. Boese (Atty. Litigation Sec. Civil Div.) to WEINSTEIN, J. dtd 4/20/77. RE: Court set a 30 day time limit on discovery which is due to expire on 4/21/77. We request that limit of 30 days be altered to allow for such depositions after 4/21/77 , Atty for plttf. concurs, filed.	(10) <i>lg.</i>
12/77		BY WEINSTEIN, J. ORDER that motion (for deposing plttf's AVERY and individuals in other cases 'will be done during the week of 4/25/77 or 5/1/77) GRANTED on consent. (FILED ON DOCUMENT # 10) <i>lg.</i>	
8/77		Plttf's notice to take deposition on 5/5/77 of CENTRAL INTELLIGENCE AGENCY and F.B.I. filed.	(11) <i>lg.</i>
8/77		Plttf's answers to def's interrogatories. filed.	(12) <i>lg.</i>
9/77		Gvt. Memorandum of U.S. Mag. CHREIN to WEINSTEIN, J. dtd 4/28/77 RE: Def's objections to plttf's interrogatories. filed. <i>lg.</i>	(13)
9/77		Notice to take deposition of plttf on 4/29/77 by def. filed. <i>lg.</i>	(14)
1/77		Copy of letter of Melvin L. Wulf to Roger Field (AUSA) dtd 5/2/77. RE: ADvising 'def's in this case of witnesses and documents requested by plttf's filed.	(15) <i>lg.</i>
-77		Deft's supplemental objections to plttf's interrogatories filed.	(16) <i>lg.</i>
-77		Answer of USA to plttf's first interrogatories filed. mg	(17) mg
-77		Deft's objections to plttf's interrogatories filed.	(18) mg
1/77		Letter of Burt Neuborne to WEINSTEIN, J. dtd 5/2/77. RE: A letter regarding plttf. in which she wrote to a Russian artist has been intercepted and copied. Contents reveal a close personal relationship between plttf. & Russian artist. She was informed by Cen. Intelligence Agency, and I request that plttf be permitted to seek relief without risking public embarrassment & endangering physical safety of a close friend filed. <i>See 77C 597</i>	(19) <i>lg.</i>

B. Leonard Avery v- U.S.A.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. 77-C-234
B. LEONARD AVERY		UNITED STATES OF AMERICA	PAGE ____ OF ____ PAGES
DATE	NR.	PROCEEDINGS	
5/5/77		BY WEINSTEIN, J. ORDER dtd 5/2/77 that the parties shall arrange with my office for a pre-trial hearing on this issue. Pending a disposition the letter will be sealed. The clerk shall notify the parties. So Ordered, filed. (FILED ON 2nd page of Document # 19) <i>lg.</i> Copies mailed & pty's notified. <i>lg.</i>	
5/6/77		Before WEINSTEIN, J. Case called. 76-C-1837 77-C 234 & 77-C-597 are consolidated for purposes of trial. Pre-trial conference held & concluded. Trial set for 5/9/77. Court reporter present. <i>lg.</i>	
5-9-77		Before WEINSTEIN, J. Case called. Trial ordered & begun. Jurors selected & sworn. Trial cont'd to 5-11-77.	
5-9-77		Govt's trial brief filed in 76 C 1837.	
5-9-77		Govt's proposed questions to be asked potential jurors filed in 76 C 1837	
5-9-77		Govt's memo on matters to be determined prior to trial filed in 76 C 1837	
5-10-77		Defts' proposals for charge to jur filed in 76 C 1837.	
5/11/77		Before WEINSTEIN, J. Case called. Trial resumed. Jury charged & marshals sworn. Jury retires for deliberation. Trial continued to 5/12/77. Court reporter present. <i>lg.</i>	
5/12/77		Copy of def's proposals for the charge to the jury filed. (FILED IN 76-C-1837 Doc. #47) <i>lg.</i>	
5/12/77		Copy of plttf's requests to charge filed. (FILED IN 76-C-1837 Doc. #48) <i>lg.</i>	
5-12-77		Before WEINSTEIN, J. Case called. Trial resumed. Jury resumes deliberation. Order of sustenance signed (coffee). Order of sustenance signed. (lunch) Jurors ret and advise the Court that 8 jurors find for each of the above plttfs in the amount of \$5,000. Three of the jurors find for the plttfs in the amount of \$10,000. One juror finds for the plttfs in the amount of \$2,500. Advisory jury discharged. All parties to submit briefs. Trial concluded. Decision reserved. <i>mg.</i>	
5/23/77		Stenographer's transcript dtd 5/9/77 filed. (FILED IN 76-C-1837 Document #52) <i>lg.</i>	
6-1-77		Sten. transcripts dtd 5-11-77 and 5-12-77 filed. See 76C 1837. <i>mg.</i>	
8/1/77		Letter of Herbert Jordan (atty. for plttf.) to WEINSTEIN, J. dtd 7/27/77. IN RE: Retraction of libelous statement's pursuant to letter of WEINSTEIN, J. dtd 7/26/77 to U.S. Atty. filed. (FILED IN 76-C-1837 Document # 54) <i>lg.</i>	
8-9-77		Letter from Rodger C. Field dtd 8-8-77 filed in 76C-1837. <i>mm</i>	
8-15-77		Post-trial memorandum of debt USA filed in 76C-1837. <i>mm</i>	
8-17-77		By WEINSTEIN, J. - Memorandum and order dtd 8-17-77 that the U.S.A. committed torts against plttfs & that plttf shall each have judgment for \$1,000 plus costs filed in 76C-1837. <i>mm</i> (p/c mailed to attys). <i>mm</i>	
8/17/77		Letter filed to Judge Weinstein from Barbara Allen Babcock, re: Govts regret for inconvenience caused by the interference with the plttfs mail, draft of letter enclosed. tk (20)	
8-18-77		Trial brief of USA filed in 76C-1837. <i>mm</i>	
8-18-77		Letter from chambers dtd 7-26-77 filed in 76C-1837. <i>mm</i>	

IL DOCKET CONTINUATION SHEET

PLAINTIFF

DEFENDANT

DOCKET NO. 77C-234

PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS
-18-77		Trial memorandum of pltffs filed. (21)
-18-77	56	JUDGMENT that pltffs recover compensatory damages of \$1,000 plus costs filed in 76 C 1837. ld ===
10-13-77		Notice of appeal filed in 76 C 1837. Copy of notice mailed to C of A. ld ===
10/18/77		Amended notice of appeal filed in 76 C 1837. Docket entries and duplicate mailed to the C of A/ tk ----
0/28/77		Pltff N. Birnbaums notice of appeal, dtd 10/27/77. Copies of docket entries sent to C of A, debt USA notified.jm (see 67 of 76-C-1837)
1/9/77		Civil appeal scheduling order dtd 11/3/77 that record on appeal be filed. on or before 11/21/77 etc, filed.jm (see 16 of 77C597)
1/9/77		Civil appeal scheduling order dtd 11/7/77 that record on appeal be filed on 11/25/77 filed.jm (see 17 of 77C597)
1-21-77		Civil appeal scheduling order #2 filed in 76-C-1837 fy --
1/29/77		RECORD ON APPEAL CERTIFIED and mailed to COURT of Appeals. <i>lg,</i>
1/6/77		Acknowledgment received from court of appeals for receipt of record

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

B. LEONARD AVERY,

Plaintiff

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION
No.

CIV. 4-76-347
COMPLAINT

1. This action is brought under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq.
2. Plaintiff Avery is a citizen of the United States and a resident of the State of Minnesota.
3. Defendant is the United States of America.

FACTS

4. Plaintiff is the recipient of a first class letter sent in 1968 by his son, Michael Avery, which the Central Intelligence Agency has informed Michael Avery, by letter dated June 11, 1975, was wrongfully and surreptitiously opened, read, photographed, circulated and filed by defendant's agents, servants and employees.

5. On information and belief, agents, servants and employees of the United States conducted a massive, covert, illegal and wrongful operation throughout the United States to intercept, open, read and photograph the contents of tens of thousands of sealed first-class letters

deposited in the United States mails by United States citizens and residents, or letters mailed to the United States to be delivered to United States citizens and residents. This illegal, wrongful and unconstitutional activity was conducted for an extended period of time, the length of which is not known to plaintiff, but which includes the period from February 1953 to February 1973.

6. On information and belief, from 1953 to the present, defendant's agents, servants and employees engaged in an extended conspiracy to conduct an illegal and wrongful program to collect and maintain files concerning the plaintiff and others, and to widely disseminate the contents of those files, including copies of their illegally seized mail, throughout agencies of the defendant and to persons not employed by the defendant.

7. On information and belief, employees of the defendant wrongfully engaged in an extended conspiracy unlawfully to conceal the acts complained of in paragraphs 4 and 5 from plaintiff and from the public.

8. At the time of the acts described in paragraphs 4 through 7, defendant's employees who wrongfully committed the acts were regularly in the service and employ of the defendant and were acting within the scope of their office or employment.

9. At no time did defendant's agents, servants and employees have the authority of a warrant issued by a federal judicial officer to search and seize plaintiff's

sealed first-class letters, nor did defendant's agents, servants and employees have any lawful authority to search and seize plaintiff's sealed first-class letters without a warrant.

10. On information and belief, all or some of the acts described above occurred in the States of Minnesota, Connecticut, New York, Virginia, and in the District of Columbia.

11. On December 5, 1975, plaintiff filed a claim for damages, as required by 28 U.S.C. §2675, with the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Justice and the United States Postal Service. The claims were denied by the Department of Justice by letter dated February 12, 1976, and by the Central Intelligence Agency, by letter dated March 11, 1976. The United States Postal Service and the Federal Bureau of Investigation have failed to make a final disposition of the claim, and plaintiff hereby deems such failure to be a denial of the claim, as authorized by 28 U.S.C. §2675. This suit is commenced within six months of the denial of these claims, as required by 28 U.S.C. §2401.

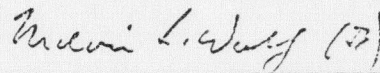
12. The wrongful acts of defendant's agents, servants and employees, as described above, injured plaintiff under circumstances where the United States, if a private person, would be liable to plaintiff in accordance with the law of the place where the acts occurred.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of \$20,000 compensatory damages for the interception, opening, reading, photographing, copying, circulating and/or filing of, and/or other wrongful interference with, the letter belonging to plaintiff, plus costs and attorneys' fees.

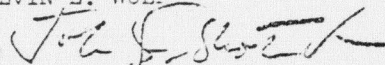
Respectfully submitted,



RANDALL TIGHE
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414



MELVIN L. WULF



JOHN H. F. SHATTUCK
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

RICHARD W. ZACKS
Winograd, Shine & Zacks
2220 Hospital Trust Tower
Providence, Rhode Island 02903

BURT NEUBORNE
New York University Law School
40 Washington Square South
New York, New York 10012

Attorneys for Plaintiff

Dated: July , 1976

B. LEONARD AVERY,
Plaintiff,
v.
UNITED STATES, et al.,
Defendants.

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)
)
) Civil Action No. 77C 234
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First Defense

5. Denied, except to admit that the CIA from 1953 to 1973 conducted a program, code-named Operation HTLINGUAL, under which certain letter rate mail to and from the Soviet Union was opened, photographed, and filed. Some of these letters were provided to the FBI or other government agencies.

6. Denied, except to admit that the CIA from 1953 to 1973 conducted a program, code-named Operation HTLINGUAL, under which certain letter rate mail to and from the Soviet Union was opened, photographed, and filed. Some of these letters were provided to the FBI or other government agencies.

7. Denied.

8. This paragraph sets forth conclusions of law and not allegations of fact, for which no answer is required, but if an answer is deemed required, denied.

9. Denied, except to admit that the letter to plaintiff was opened without a warrant.

10. Denied, except to admit that all or some of the acts described above in the complaint occurred in the States of New York and Virginia.

11. Admitted.

12. Denied.

The remainder of the Complaint constitutes plaintiff's prayer for relief for which no answer is required, but if an answer is deemed required, denied.

All allegations not specifically admitted, qualified or denied above are hereby denied.

Second Defense

This action is barred by the exceptions to the Federal Tort Claims Act, 28 U.S.C. §1380(h).

Third Defense

This case is barred by sovereign immunity.

Fourth Defense

This action is barred by the statute of limitations.

Fifth Defense

This Court lacks jurisdiction over the subject matter of this action.

Sixth Defense

Plaintiff has consented to any putative damages allegedly incurred.

Seventh Defense

Plaintiff has failed to state a claim upon which relief can be granted.

WHEREFORE, defendant, having fully answered, pray that this action be dismissed.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General
DAVID G. TRAGER
United States Attorney
ROGER FIELD
Assistant United States Attorney
DENNIS G. LINDER
JOHN T. BOESE
Attorneys, Department of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Attorneys for Defendants

76C 1837- BIRNBAUN vs CIA

DATE NR.

PROCEEDINGS

0-6-76	Complaint filed. Summons issued.	(1)
0-7-76	By WEINSTEIN, J. - Order dtd. 10-6-76 referring the action to the Magis filed.	(2)
0-19-76	Summons ret. and filed/ executed.	(3)
1-29-76	Notice of motion ret. 12-7-76 for an order staying discovery filed.	(4)
2-2-76	Copy of letter dtd. 11-30-76 from H. Jordan to Mag Chrein re: tp hear motion before J. Weinstein filed.	(5)
2-2-76	Pltff's memo of points and authorities in opposition to motion to motion for an order staying discovery filed.	(6)
2-6-76	Copy of letter dtd. 12-2-76 from E. Rudofsky AUSA to Mag. Chrein re: to hear motion before Mag. filed.	(7)
2-7-76	Before CHREIN, MAG. - case called - stay granted to 1/11/77 at 9:30 AM - conference to be held at that time - in the event motion to dismiss is not served on 12/13/76 conference will be advanced to 12/20/76 at 9:30 AM	
2-13-76	Notice of motion ret 12-23-76 at 9:30 AM for the entry of an order dismissing the complaint etc. filed, with memo of law in support.	(8/9)
2-17-76	Letter dtd 12-17-76 to J. Weinstein from Herbert Jordan re motion to dismiss ret 12-22-76 filed. SO ORDERED 12-16-76.	(10)
2-17-76	Pltff's opposition to defts' motion to dismiss filed.	(11)
2-22-76	Before Chrein, J--case called--defts motion to dismiss the complaint argued & ruled with leave to renew at end of discovery--discovery stay to be contd until 1/11/77 or until magistrate Chrein may say.	(12)
2-23-77	Answer of debt filed.	(13)
2-24-77	Defts' answers to pltff's interrogatories filed.	(14)
2-24-77	Before Chrein, Mag--conf held - discussions had-conf adjd to 2/24/77. Pltff's memo in support of motion for summary judgment filed with notice of motion ret 1-31-77.	(15)
2-24-77	ANSWER filed.	(16)
2-31-77	Before WEINSTEIN, J. - Case called & adj'd to 2-17-77 at 9:30 AM.	
2-31-77	Letter dtd 1/31/77 to Judge Weinstein from Edward Rudofsky, AUSA - re: confirmation of oral argument on pltffs motion for summary judgment returnable 2/17/77 at 9:30 a.m., and defts opposing papers will be served by 2/11/77 and pltffs reply papers, will be served and filed by 2/16/77.	(17)
2-14-77	Letter dtd 2-10-77 to J. Weinstein from AUSA Rudofsky re confirming scheduling changes etc filed. SO ORDERED 2-11-77.	(18)
2-17-77	Before WEINSTEIN, J. Case called. and motion adj. to 3/11/77.	
2-24-77	Letter dtd 2-22-77 to Clerk from Alphonse M. Alfano with copy of Judge Robinson's memo & order re Hardy v. USA attached.	(19)
2-24-77	Before Chrein, Mag--conf adjd to 3/38/77.	
3-7-77	Notice of cross motion ret 3-11-77 for an order denying pltff's motion for summary judgment filed.	(20)
3-9-77	Pltff's reply filed.	(21)
3-11-77	Before Weinstein, J--civil motion-motion for an order denying pltffs motion for summary judgement-case motion to dismiss-denied--can proceed under Fed. Tort claims set for trial 5/6/77 briefs on jury issue due in 3 weeks dismissed dismissed against unknown agents w/o prejudice-so order	
3-11-77	Supplemental response to pltff's request for production of documents; filed. by def's. and DEF'S MEMORANDUM in support of def's objections to pltff's request for production of documents and pltff's interrogatories, filed.	(22 & 23)



PLAINTIFF		DEFENDANT	DOCKET NO.
			PAGE ____ OF ____ PAGES
DATE	NR.	PROCEEDINGS	
3/11/77		Affidavit of Director of Security, Central Intelligence agency, filed. <i>lg</i> (24)	
3-11-77		By WEINSTEIN, J-Civil pre trial order ret 5-6-77 filed. (25)	
3/22/77		Deft's interrogatories to pltff with defts answers to pltff's interrogatories filed. (26/27)	
3/24/77		Pltff's interrogatories to defts director of Central Int Agency and USA Second set filed. (28)	
3/28/77		Before CHREIN, U.S. Magistrate. Case called. Conference held. No further conference date. Rulings made as to interrogatories filed. (29)	
4-1-77		Pltff's memo of law in support of trial by jury filed. (29)	
4-4-77		By WEINSTEIN, J.-Order filed that motion for jury trial will be argued on 4-6-77 at 9:30 A.M. (parties notified by telephone as per order of Judge Weinstein) (30)	
4-4-77		Brief of U.S. on issue of jury trial filed. (31)	
4/7/77		Before Weinstein, J--case called court reporter present-pltff's motion for a jury argued and denied-so ordered. (32)	
4-18-77		Sten. transcript dtd 4-7-77 filed. <i>mg</i> (32)	
4-22-77		Petition for writ of habeas corpus <i>XXmg</i> mandamus filed (33)	
4-27-77		Letter dtd 4-26-77 to J. Weinstein from Herbert Jordan re pltff's petition for mandamus concerning jury trial filed. (34)	
4-27-77		By WEINSTEIN, J-Order dtd 4-27-77 that the trial will proceed as scheduled. See bottom of document #34. ---	
4/29/77		Pltff's response to def's interrogatories and request for production filed. <i>lg</i> (35)	
5-4-77		Pltff's trial memo filed. <i>mg</i> (36)	
5/5/77		Application for stay of trial pending petition for certiorari filed by atty. for petitioner. (37)	
5/5/77		Copy of letter of Herbert Jordan (atty. for pltff.) to JUDGES MANSFIELD, PALMIERI, SMITH at US Court house in Foley Sq.)dtd 4/29/77. RE: Gvt's response to petition for mandamus. Gvt.'s representation is that WEINSTEIN, J. ordered case to be tried to an advisory jury and we have received no notice to that effect. filed. (38)	
5/5/77		Copy of application for stay of trial pending petition for certiorari to Honorable Thurgood Marshall (CIRCUIT JUSTICE for Second Circuit) Supreme Ct.) filed. (39)	
5/5/77		Def's ANSWERS to pltff's interrogatories to def's DIRECTOR OF CENTRAL INTELLIGENCE AGENCY and U.S.A. (second set) filed. (40)	
5/6/77		Before WEINSTEIN, J. Case called. 76-C-1837, 77-C-234 & 77-C-597 are consolidated for purposes of trial. Pre-trial conference held & concluded. Trial set for 5/9/77. <i>lg</i> . Court reporter present. <i>lg</i> .	

PLAINTIFF

DEFENDANT

DOCKET NO. 76-C-1837

PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS	
6/77		Copy of letter of Herbert Jordan (atty. for plttf.) to JUDGES MANSFIELD PALMIERI SMITH(U.S. Courthouse. Foley Sq. NY, NY) dtd 5/3/77. RE: Application for a stay pending certiorari is submitted in advance of court's decision on mandamus. If court refuses mandamus & stay we wish to apply to Circuit Justice MARSHALL for a stay filed.	(41) <i>lg.</i>
9-77		Before WEINSTEIN, J. -- Case called. Trial ordered & begun. Jurors selected & sworn. Trial cont'd to 5-11-77	
9-77		Govt's trial brief filed.	(42) <i>lg.</i>
9-77		Govt's proposed questions to be asked potential jurors filed.	(43)
9-77		Govt's memo on matters to be determined prior to trial filed.	(44)
10-77		Defts' proposals for charge to jury filed.	(45)
11/77		Certified copy of order from Court of Appeals signed by JUDGES, MANSFIELD, PALMIERI, & SMITH DENYING petition for a writ of mandamus filed.	(46) <i>lg.</i>
11/77		Before WEINSTEIN, J. Case called. Trial resumed. Jury charged & marshals sworn. Jury retires for deliberation. Trial continued to 5/12/77. Court reporter present. <i>lg.</i>	
12/77		Copy of def's proposals for the charge to the jury filed.	(47) <i>lg.</i>
12/77		Copy of plttf's requests to charge filed.	(48) <i>lg.</i>
12-77		By WEINSTEIN, J. - Order of sustenance dtd 5-12-77 filed. mg	(49)
12-77		By WEINSTEIN, J. - Order of sustenance dtd 5-12-77 filed. (coffee)	(50)
12-77		Before WEINSTEIN, J. - Case called, trial resumed. Jury resumes deliberation. Orders of sustenance for lunch and coffee signed. Jurors return and advise the Court that 8 jurors find for each of the plttfs in the amount of \$5,000. Three of the jurors find for the plttfs in the amount of \$10,000. One juror finds for the plttfs in the amount of \$2,500. Advisory jury discharged. All parties to submit briefs. Trial concluded. Decision reserved. mg	(51) <i>tk</i>
23/77		Stenographers transcript dtd 5/9/77 filed.	(52/53)
1-77		Sten. transcripts dtd 5-11-77 and 5-12-77 filed. mg	
1/77		Letter of Herbert Jordan (atty for plttf.) to WEINSTEIN, J. dtd 7/27/77. IN RE: Retraction of libelous statements pursuant to letter of WEINSTEIN, J. dtd 7/26/77 to U.S. Atty. filed.	(54) <i>lg.</i>
-9-77		Letter from Rodger C Field dtd 8-8-77 filed. m.m.	(55)
-15-77		Post-trial memorandum of deft U.S.A. filed. mm	(56)
-17-77		By WEINSTEIN, J. - Memorandum and order dtd 8-17-77 that the U.S.A. committed torts against plttfs & that plttf shall each have judgment for \$1,000 plus costs filed. (p/c mailed to attys) mm	(57)
17/77		Letter filed to Judge Weinstein from Barbara Allen Babcock, re: Govts regret for inconvenience caused by the interference with the plttfs mail, draft of letter enclosed. t k	(58)
-18-77		Trial brief of USA filed. mm	(59)
-18-77		Copy of Magistrate's report from USDC-Hawaii filed. mm	(60)
-18-77		Copy of Memorandum of USA in opposition to application for stay of trial pending petition for writ of certiorari filed. mm	(61)
-18-77		Plttf's trial memorandum filed. mm	(62)
-18-77		Letter from chambers dtd 7-26-77 filed. mm	
-18-77		JUDGMENT that plttfs recover \$1,000 compensatory damages plus costs filed. <i>Cont'd -14-</i> ld	(63) (64)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. 76C1837
BIRNBAUM		USA	PAGE E OF _____ PAGES

DATE	NR.	PROCEEDINGS
10-13-77		NOTIC EOF APPEAL FILED. Copy of notice mailed to C of A. Id (65)
10/18/77		Amended notice of appeal filed. Docket entries and duplicate of Notice of Appeal mailed to the C of A. Ek (66)
10/26/77		Pltff's notice of cross appeal filed. DoCKET entries and copy of Notice of Cross-appeal maile to C of A. jm (see 77-C-597 #15)
10/28/77		Pltff N. Birnbaum's notice of appeal, dtd 10/27/77, filed. Copies of dockets entries sent to C of A with copy of notice of appe Deft USA notified.jm (67)
11/9/77		Civil appeal scheduling order dtd 11/3/77 that record on appeal be filed. on or before 11/21/77 etc, filed.jm (see 16 of 77C597)
11/9/77		Civil appeal scheduling order dtd 11/7/77 that record on appeal be filed by 11/25/77 filed.jm (see 17 of 77C597)
11-21-77		Civil appeal scheduling order filed. (#2) fy (68)
11/29/77		RECORD ON APPEAL CERTIFIED and mailed to Court of Appeals. lg.
12/6/77		Acknowledgment received for receipt of record

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
NORMAN BIRNBAUM, :

Plaintiff, :

-against- :

UNITED STATES OF AMERICA, :
DIRECTOR OF CENTRAL INTEL- :
LIGENCE, and UNKNOWN AGENTS :
OF THE CENTRAL INTELLIGENCE :
AGENCY, :

Defendants. :

COMPLAINT

Civil Action No.

76C 1837

----- x
1. This case arises under the Constitution, Amendment IV, under state law of trespass and invasion of privacy, and under 28 U.S.C. §§ 2671, et seq. The amount in controversy exceeds \$10,000.00 exclusive of interest and costs. Jurisdiction is conferred by 28 U.S.C. §§ 1331 and 1346(b).

2. Plaintiff is a citizen of Massachusetts and a Professor of Sociology at Amherst College.

3. The defendants are: the United States of America; the Director of Central Intelligence, sued in his official capacity; and agents of the Central Intelligence Agency, whose names are presently unknown to plaintiff, sued in their individual capacities.

4. On or about September 28, 1970, in Amherst, Massachusetts, plaintiff wrote and deposited in the United States mail a letter in a sealed envelope, with first class postage affixed, addressed to a colleague, Professor Constantin Gullian, in Bucharest, Rumania.

5. At about the same time and place, plaintiff deposited in the mail a letter in a sealed envelope, with first class postage affixed, addressed to another colleague, Professor D. M. Ugrinovitsch, in Moscow, U.S.S.R.

6. The defendant unknown agents of the CIA, located at Kennedy Airport in New York City, subsequently intercepted and opened the envelopes and copied the letters.

7. On information and belief, at times unknown to plaintiff, defendant unknown agents of the CIA opened and copied numerous other pieces of plaintiff's first class mail.

8. The said defendants acted within the scope of their employment.

9. The said defendants acted without warrants or other valid authority.

10. The said defendants and other CIA employees fraudulently concealed their acts until June 17, 1975, and plaintiff neither knew nor reasonably could have known of the said acts prior to that date.

11. The defendant Director of Central Intelligence retained and continues to retain copies of plaintiff's letters in CIA files.

12. As a result of the acts referred to above, plaintiff sustained damage to his privacy, his exclusive property interest in the contents of his mail, and his interests protected by the Fourth Amendment, in the amount of \$50,000.00.

[11]

13. By opening and copying plaintiff's sealed, first class mail, without warrants or other valid authority, the defendant unknown agents acted unlawfully in that:

(a) they unreasonably searched and seized plaintiff's papers and effects, in violation of the Fourth Amendment; and

(b) they invaded plaintiff's privacy and trespassed upon plaintiff's property interest in the contents of the envelopes, in violation of the common law of New York.

14. By retaining copies of plaintiff's letters in CIA files the defendant Director of Central Intelligence acted and continues to act unlawfully in that the said copies are fruits of unlawful search and seizure.

15. The United States of America is liable, pursuant to 28 U.S.C. §§ 1346(b) and 2674, for the damages sustained by plaintiff as a result of the above-described wrongful acts of government employees.

16. On August 3, 1975, plaintiff presented his above-described claim for damages against the United States to the Central Intelligence Agency and, on October 9, 1975, plaintiff presented an amended claim, but the CIA failed to make final disposition of the claims within six months thereafter.

WHEREFORE, plaintiff requests relief in the form of

A. Judgment against the United States of America and the defendant unknown agents for \$50,000.00 plus costs; and

B. A permanent injunction (a) retraining the Director of Central Intelligence, his agents, subordinates and privies, from retaining copies of plaintiff's letters in CIA files, and (b) directing the said defendant to deliver to plaintiff all copies of plaintiff's letters under the said defendant's custody or control.

Dated: October 6, 1976

Herb Jordan

HERBERT JORDAN
Rabinowitz Boudin & Standard
30 East 42nd Street
New York, New York 10017
(212) 697-8640
Attorneys for Plaintiff

JURY TRIAL DEMAND

Plaintiff demands trial by jury.

[4-1

-19-

CIS:ESR:gp
F. 762447

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
NORMAN BIRNBAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA, et al.,

Defendants.
----- X

Civil Action
No. 76 C 1837

AMENDED
ANSWER

As and for their amended answer in this action, defendants UNITED STATES OF AMERICA and DIRECTOR OF CENTRAL INTELLIGENCE, by their undersigned attorney, hereby respond to the numbered allegations of plaintiff's complaint as follows:

1. Admit the allegations of paragraphs "3", "11" and "16".

2. Admit the allegation of paragraph "9" that the defendants acted without warrants. See paragraph 5, infra.

3. Deny the allegations of paragraphs "1", "7", "10", "12" and "15".

4. Lack knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraphs "1", "4", "5" and "6", except admit in response to the allegations of paragraph "6" that two of plaintiff's letters were opened and copied.

5. Neither admit nor deny the allegations of paragraphs "8", "13" and "14", and the allegation of paragraph "9" that the defendants acted without valid authority other than warrants, inasmuch as the said allegations set forth questions of law which require no response by defendants.

AFFIRMATIVE DEFENSES

As and for separate and distinct affirmative defenses to this action, defendants aver:

6. The court lacks subject matter jurisdiction over this action in whole or in part.

7. The complaint hereto fails to state a claim against the responding defendants upon which this court can grant relief.

8. The prayer for injunctive relief is moot.

9. This action is barred by the Statute of Limitations.

10. The demand for a jury trial as against the United States of America is null and void by reason of 28 U.S.C. §2402.

WHEREFORE, defendants UNITED STATES OF AMERICA and DIRECTOR OF CENTRAL INTELLIGENCE, by their undersigned attorney, demand judgment in their favor, dismissing the complaint as against the said defendants and awarding to the said defendants the costs and disbursements incurred in the defense of this action.

Dated: Brooklyn, New York
January 21, 1977

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
UNITED STATES OF AMERICA and
DIRECTOR OF CENTRAL INTELLIGENCE
225 Cadman Plaza East
Brooklyn, New York 11201

By:

EDWARD S. RUDOFISKY
Assistant U.S. Attorney
(212) 330-7100

TO:

Rabinowitz, Boudin &
Standard, Esqs.
30 East 42nd Street
New York, New York 10017
Att: Herbert Jordan, Esq.

[-2-]

- 21 -

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 BIRNBAUM :

5 -against- :

76 C 1837

6 UNITED STATES OF AMERICA, :

7 Defendant. :

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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ APR 18 1977 ★

TIME A.M. _____
P.M. _____

United States Courthouse
Brooklyn, New York

April 7, 1977
9:30 o'clock a.m.

Before :

HONORABLE JACK WEINSTEIN, U.S.D.J.

stenographic notes in the case of
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Henri Le Gendre
Official Court Reporter
U.S. District Court

HENRI LE GENDRE
ACTING OFFICIAL COURT REPORTER

Appearances:

HERBERT JORDAN, ESQ.
Attorney for the Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD RUDOFISKY, ESQ.
Assistant United States Attorney

1 THE CLERK: Birnbaum versus U.S.A.

2 THE COURT: I've read the recent Supreme
3 Court cases, Atlas Roofing, the occupational safety
4 and health, which has a lot of dictum that supports
5 the plaintiff, that I don't think really helps the
6 plaintiff at all. Very good brief, but you can't
7 show me a single case in the Federal Tort Claims
8 Act.

9 MR. JORDAN: I can't show you any case where
10 a jury was given and no case where this issue was
11 considered except for the 1961 decision in the
12 District of Delaware.

13 THE COURT: Every judge assumes that you're
14 not entitled to a jury. I don't myself think that
15 you are going to get a jury from any appellate court.
16 Now, I have to predict what the Supreme Court will
17 do with these cases. It is perfectly clear from
18 the recent cases that they are cutting down the
19 right to a jury in a variety of instances using a
20 number of different theories. The Atlas case goes
21 on a different administrative theory and doesn't
22 apply to this case. It's also clear to me that
23 given the present load of the Federal courts,
24 certainly the chief justice and the other justices
25 would not want to add to the burden of the courts

1 by requiring juries in these cases because if you
2 are right on this, then you are right on practically
3 all of the Federal tort claim cases that we have, and
4 instead of trying cases in a half-hour and settling
5 98 percent of our Federal tort claim cases this will
6 become a substantial part of our workload. It
7 doesn't seem like there is any substantial probability
8 that you will get any court to say you are entitled
9 to a jury.

10 MR. JORDAN: I understand. Also as you
11 can see from our brief the law in this area seems
12 to me under the test that has been articulated that
13 a jury trial --

14 THE COURT: Even in Atlas where the jury
15 trial was denied, a lot of the dicta and the whole
16 thrust of the rationale lead in the direction --
17 have you read the case?

18 MR. JORDAN: That's the only case which the
19 Supreme Court has failed to uphold and extend the 7th
20 amendment.

21 THE COURT: A lot of the approach follows
22 your approach. If it's an Article 3 court it's
23 argued you can't deny it; if it's an administrative
24 tribunal you can deny it, but I just don't
25 believe that they're going to require jury trials
in these Federal tort cases.

1
2 MR. JORDAN: It must be of a serious concern,
3 anyone looking at this problem, but if the law is
4 clear, as it does seem to me under the decided cases,
5 that a jury trial is required, the way it is set up
6 and it is up to Congress basically to perhaps pass
7 Federal tort cases to the Court of Claims or some
8 other agency, if the program that's set up now is
9 inconsistent with the Constitution, and if to make
10 it consistent with the Constitution is a burden that
11 they are unwilling to shoulder then it may well be
12 open to Congress to abolish tort suits against
13 the United States in the District Courts and handle
14 this problem in some other way.

15 One thing Congress can't do is set up it up
16 so that citizens can bring civil actions in the Federal
17 court of general jurisdiction; suits at common law
18 according to any definition has come out of the
19 court in recent years, and then say in this kind of
20 suit, in common law, you can't have a jury trial,
21 that's what the Seventh Amendment forbids.

22 THE COURT: I don't believe the categories
23 are rigid as you suggest. The history of this
24 Federal tort claims, as I understand it, is that
25 Congress handled it essentially by committees. It's
really congressional tribunal and they sent it to

1 Federal courts. If they sent it to the Congressional
2 Tribunal, based on the cases I think that it's little
3 question today that they could deny a jury trial,
4 it's a special tribunal; instead they sent it to the
5 District court. The District court might have said,
6 this administrative decision you can't give it to
7 an Article 3 court, but they didn't. I think that
8 there is an intermediate category where Congressional
9 interpretation of the Constitutional limits will not
10 be ignored by the court. The courts are not the only
11 interpreters of the Constitution, the Congress also
12 is an interpreter of the Constitution. It seems to
13 me this is an either-or situation.

14 MR. JORDAN: I don't think Congress did
15 interpret. I think being realistic, Section 2402,
16 Congress has not had an opportunity to interpret the
17 Seventh Amendment as it applies to jury trials, as
18 it applies to tort claims suits in District courts
19 since the mid-1940's, when they enacted the statute.
20 And as you know, the concept of the Seventh Amendment
21 in its scope, what the term suits at common law means has
22 been altered dramatically, and we do not have a
23 situation where Congress has undertaken a study of
24 the relationship between the Seventh Amendment and
25 jury trials in tort claim act suits, and so we don't

1 have a situation where we are asking any court to
2 overturn a considered judgment of Congress about the
3 constitutionality of this. In fact one must doubt
4 that Congress would, if they knew about this problem,
5 because in fact Congress has been solicitous. In the
6 Judiciary Act of 1789, the first judiciary act, in all
7 cases except bills of equity, you would have a jury trial.
8 It didn't say suits at common law. It said "All."

9 THE COURT: It probably went further than the
10 Constitution required, that's been true of the states
11 too.

12 MR. JORDAN: And as Justice Story pointed out,
13 Parsons versus Bedford, the Constitution never would
14 have been adopted if there hadn't been assurances
15 that the Seventh Amendment would be adopted thereafter;
16 so it's something that the people and Congress have
17 been extremely solicitous of, and I don't think we
18 should lightly impute to Congress any intent to carefully
19 toe the line or walk the narrow border between what
20 the Seventh Amendment requires and what it doesn't,
21 particularly in a situation where there is no reason
22 to think that Congress ever considered this provision.

23 THE COURT: Well, they stated very explicitly
24 in the statute, no right to jury trial. As I say,
25 the tendency in the Supreme Court is clearly to cut

1 down the right of jury trial. I think some of what
2 they have done is to cut juries to six, for example,
3 not a majority verdict in criminal cases and the like,
4 but the present tendency in the Supreme Court is to
5 cut the jury trial down, particularly the Chief
6 Justice is very much under the British influence.

7
8 MR. JORDAN: That's so, your Honor. Except
9 for the Atlas case this Seventh Amendment area is the
10 only area in the Bill of Rights where it has not
11 cut back. As recently as 1974 we had two decisions
12 from this court and with near unanimity. It hasn't
13 been a closely divided court.

14 THE COURT: I appreciate it. You have a very
15 good brief, it hasn't persuaded me. I'm trying to
16 predict what an Appellate Court would do under these
17 circumstances.

18 Now, I don't know whether there is any point
19 in certifying it because the Second Circuit doesn't
20 take any of these certifications.

21 MR. JORDAN: I think it would be better to
22 handle it by way of respectful mandamus, it's faster.

23 THE COURT: I would like to, if you could,
24 to get it reversed.

25 I was considering an advisory jury here. I
think this is the kind of situation where the public

1 through a jury participates, it's kind of a
2 political tort problem, and the jury's judgment in
3 such situations I think is very useful. It depends
4 on what the public thinks is right and wrong, so if
5 you could get me mandamus I would be delighted to
6 try it before a jury. I'm doing what I think the
7 Appellate Court would ultimately require, which is
8 nonjury.

9
10 How do you want to handle it? It's set for
11 trial in the summer.

12 MR. RUDOFISKY: May 6.

13 THE COURT: What do you want to do?

14 MR. JORDAN: Well, probably we would get a
15 decision on mandamus by May 6. We'll apply promptly.

16 THE COURT: You say the trial judge
17 encourages you to seek mandamus and encouraged you
18 to get a speedy decision. I would be delighted to
19 see me reversed.

20 MR. JORDAN: Your Honor, I would rather
21 defend you.

22 THE COURT: I just don't think this is the
23 direction the law is going in. It's hard to predict
24 at this point. It could go in either direction, and
25 it would probably be easier to write a decision your
way, but I don't think that's the way the law is

going based on what I see going on in the Appellate
Courts in this Circuit and the Supreme Court. Motion
for a jury is denied.

MR. JORDAN: Thank you, your Honor.

THE COURT: You have a record. That may be
of some help, I don't know.

(Whereupon Court stood in recess in this
matter for the day.)

* * *

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FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE

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THE COURT: I am.

MR. NEUBORNE: I will make that clear in our testimony.

MR. BOESE: I still take exception to the Court's ruling.

THE COURT: Who is your first witness?

MR. JORDAN: Mr. Birnbaum.

(The jury is in the jury box.)

THE COURT: Good morning everybody. Call your first witness, please.

MR. JORDAN: Norman Birnbaum.

MR. BIRNBAUM: Good morning, your Honor.

THE COURT: Good morning.

N O R M A N B I R N B A U M , one of the plaintiffs herein, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. JORDAN:

Q Would you state your occupation for the jury, please?

A I am a professor at Amherst College, Amherst, Massachusetts.

Q What is your field?

A Professor of Sociology.

Q How long have you had that position?

1 A 1968.

2 Q Now, directing your attention, Professor
3 Birnbaum to the year 1970, were you at that time a member
4 of an organization known as the International Sociological
5 Association?

6 A Yes.

7 Q Would you explain to the jury what that
8 organization is?

9 A Yes, it was, and I suppose still is, a world-
10 wide organization of professors and researchers in sociology
11 with members from many different countries.

12 Q Now, in 1970, were you a member of any Committees
13 of the Association?

14 A Yes, I was a member and indeed chairman of
15 a Committee.

16 Q Now, did you have occasion in 1970 in connection
17 with your work as a member of the Committee to write letters
18 to other colleagues on the Committee?

19 A Yes.

20 Q What was the purpose of those letters?

21 A Well, to coordinate our plans for further
22 meetings in exchange for research results and plan further
23 meetings.

24 Q Was there at that time a plan to hold an
25 international conference in the near future on the subject

of the sociology of relations?

A Yes, we had such a plan.

Q Did you have occasion to write letters to any of your colleagues concerning that conference?

A Yes.

Q Do you recall the names of some of your colleagues to which you wrote letters?

A Yes, I can recall three.

Q Would you tell the jury?

A One, Professor Hans Mol, a Professor in Canada; and Professor Julian, a professor in Bucharest, Rumania; and Professor Ugrinowitsch, a professor at Moscow University.

Q Professor Birnbaum, focusing on the letters to Professor Mol in Canada and Julian in Bucharest, did you make copies of the letters that you sent to those two gentlemen?

A Yes, I did.

Q Did you send copies of those letters to anyone?

A Yes.

Q Whom did you send the copies to?

A I sent one copy to Professor Ugrinowitsch.

Q How did you send it to him?

A In the form of a Xerox copy of those letters in a regular envelope. I sent it from my office at Amherst College by the U.S. Mail.

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Q Did you seal up the envelope?

A Yes.

Q Did you put stamps on it?

A Yes.

Q Now, did your name appear on the outside of that envelope, Professor Birnbaum?

A No, the only thing that appeared, apart from the address, was Amherst College, Amherst, Massachusetts, Department of Anthropology and Sociology.

Q Did there come a time, Professor Birnbaum, in 1975, when you decided to request the CIA to provide you with copies of any files they might have concerning you?

A Yes, there was such an occasion?

Q What prompted you to do that?

A Well, the fact that the Freedom of Information Act was new and I heard that a certain number of scholars of institutions of learning had been subjected to various kinds of surveillance, I was just curious.

Q Did you make such a request of the CIA?

A Yes, I did.

Q How did you make that request?

A By a letter to the director of the CIA, through my attorney, requesting files and material on myself if there were any.

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Q I was your attorney at that time?

A Yes.

Q Professor Birnbaum, did you receive through your attorney a response to your request to the CIA?

A Yes, I did.

Q I'm going to show you this document marked Plaintiff's Exhibit 1 for identification consisting of about six pages and I ask you to look that over, please?

A Yes.

Q Is that a copy of the response which you received to your request to the CIA?

A Yes.

(Continued on next page)

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Birnbaum-direct

[11]

BY MR. JORDAN: (Cont'd.)

MR. JORDAN: At this time I offer Plaintiff's Exhibit 1 into evidence.

MR. BOESE: No objection.

THE CLERK: Plaintiff's Exhibit 1 marked in evidence.

(So marked)

Q Now, Professor Birnbaum, does Plaintiff's Exhibit 1 contain copies of any your letters?

A Yes. It contains copies of two of my letters.

Q Which letters are those?

A Well, there is a letter dated September 23, 1970 to Professor Julian in Bucharest and a letter of the same day to Professor Moln, Hamilton, Ontario, and an envelope addressed to, a copy of an envelope addressed to Professor Ugrinovitsch.

Q Thank you.

Now, apart from what you have before you, Plaintiff's Exhibit 1, did you receive anything else from CIA files concerning yourself in response to your request?

A Yes. The original letter from the CIA containing these two letters indicated that there was information about myself described by the CIA as an internal memorandum containing information provided by a

1
2 sensitive source and the CIA didn't want to release it and
3 in due course, if I remember correctly, you objected to
4 their not releasing it and they did send a copy of what
5 appeared to be a report on the activities of this committee.

6 Q All right.

7 Now, I will show you Plaintiff's Exhibit 3
8 for identification, Professor Birnbaum, and ask you to look
9 at that. Now, is that a copy of the internal CIA
10 memorandum which you just referred to?

11 A Yes.

12 MR. BOESE: No objection, your Honor.

13 THE COURT: Mark it.

14 THE CLERK: Plaintiff's Exhibit 3 for
15 identification, now marked in evidence.

16 (So marked)

17 Q Now, apart from Plaintiff's Exhibit 3 and
18 Plaintiff's Exhibit 1, Professor Birnbaum, have you seen
19 anything else from CIA files in response to your request?

20 A Not that I can remember.

21 Q Now, in responding to your request, did the
22 CIA say anything concerning whether or not there was any-
23 thing else in their files concerning you, apart from what
24 they produced for you?

25 A Well, all the CIA said was that they made a

xxx

search of their files and this is what they had found.

Q Okay.

A Now, Professor Birnbaum, after you received these materials from CIA, including copies of your letter that you testified about, did you reach any conclusion as to how the CIA obtained copies of your letters?

A Well, the only conclusion I reached was that they must have somehow gotten the letter and opened it.

Q Was that conclusion later confirmed for you?

A Well, it has been confirmed by the fact that I gather the CIA doesn't consent that it did in fact open this letter.

Q All right.

MR. JORDAN: Ladies and gentlemen, I will interrupt the examination of Professor Birnbaum to read to you a couple of sentences from a document which you will have. It is a Plaintiff's Exhibit 13 already in evidence.

It is a stipulation of facts which the Government lawyers have signed and I have signed agreeing that certain facts are true and these are some of the things that happened. There is no dispute about these.

It says: "One or more CIA employees opened

1
2 a sealed envelope containing plaintiff's corres-
3 pondence."

4 Referring to Professor Birnbaum.

5 "The envelope containing plaintiff's
6 correspondence was opened on or about September 29,
7 1970, at a mail intercept site at JFK Airport in
8 New York, New York. No warrant was obtained by the
9 CIA in connection with opening, copying or
10 distributing plaintiff's mail as referred to above.
11 Four copies of plaintiff's correspondence are
12 known to have been made."

13 Q Now, Professor Birnbaum, when you learned,
14 when you received your response to the CIA's -- to your
15 request to the CIA and learned that they had opened and
16 copies your mail, did you have any reaction?

17 A Yes. I had several reactions.

18 Q What were they, please?

19 A First, shock that my mail could be opened
20 without my consent. Secondly, outrage, that this was done
21 by a Government agency, and thirdly, that there was a
22 certain amount of fear and anxiety that this might be
23 continuing.

24 Q All right.

25 Now, when the CIA responded to your request

1
2 and disclosed to you that they were keeping a file about
3 you, keeping information about you in their files, based
4 upon your letters, did you have any reaction to that?

5 A Well, it heightened my sense of -- I say it
6 heightened everything I felt the first time. I found it
7 hard to get over the shock and my outrage certainly was not
8 diminished that this activity was followed in some way and
9 my anxiety and apprehension was still there because I
10 didn't know what else was being followed or what else was
11 being looked at.

12 Q Okay.

13 Now, you testified earlier, I believe, that
14 the letters which are there for the jurors to see,
15 Plaintiff's Exhibit 1, were letters to colleagues, that is
16 other psychologists, concerning a meeting that you were
17 trying to set up on the future.

18 Now, did the fact that the subject of these
19 letters was an academic meeting and your letters were addressed
20 to other academic colleagues of yours, have any effect on
21 the feelings that you just described that you had when you
22 learned the letters were opened.

23 A Yes, I think they did. If I could describe
24 it briefly in my own words: This afternoon I am leaving
25 and going back and face a class and when I face a class, I

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2 have a responsibility to young people entrusted to me and
3 that is to be myself or to teach without any fear or favor
4 and teach them to evaluate evidence and under those
5 circumstances, the most precious thing that we have in our
6 colleges and universities is an absolute separation of
7 teaching from Government activity, and we are not directed
8 how to teach and we are not directed how to conduct research
9 and under those circumstances what accounted for my shock
10 and outrage was the feeling that the Government felt it was
11 entitled to survey or intrude upon the independent exercise
12 of academic activity.

13 Q Okay.

14 Now, Professor Birnbaum, before you received
15 your response, from the CIA to your request, did you ever
16 before suspect that any Government employee was opening
17 your mail?

18 A Well --

19 Q Any employee of the United States Government?

20 A I had no suspicion like that since -- I just
21 didn't.

22 Q Did you ever suspect that any one was opening
23 your mail?

24 A Certainly not, no.

25 Q Professor Birnbaum, did you have any

1 intentions of publishing either of the letters that the
2 CIA made copies of?
3

4 A No, they didn't contain publishable material.

5 Q Now, as a result of the CIA copying your
6 letters and opening your envelope, did you lose any money?

7 A No, I wouldn't say that I did.

8 Q Did you suffer any loss of employment or
9 professional injury of any kind?

10 A No, I did not suffer in any direct way in those
11 ways.

12 Q Did you suffer any physical injury?

13 A No.

14 Q Well, did you suffer any injuries at all?

15 A Well, I would describe my injuries I
16 suffered as moral injury or psychological injury. It is
17 hard to live with the sense of outrage, shock,
18 disappointment in the activity of a federal agency as this.
19 It was hard to live with the anxiety and apprehension and
20 I think this, I would describe this as a form of injury.

21 MR. JORDAN: Thank you, Professor Birnbaum,
22 no further questions.
23

24 (Continued on next page.)
25

CROSS-EXAMINATION

BY MR. BOESE:

Q Good morning, Professor Birnbaum.

A Good morning.

Q Professor Birnbaum, you testified that you first learned of this as a result of Your Freedom of Information Act request from the CIA. Is that correct?

A Yes.

Q Do you know what the Freedom of Information Act is? Is it not a statute which allows any citizen to request files from the Federal Government?

A So far as I know it is that but that is part of a broader act which allows any citizen to inquire of the Federal Government about its operations.

Q You are very correct about that.

Do you recall between your initial request and the time you received your letters -- how long a time was that?

A Well--

Q About two months?

A My impression is that it was longer. My memory is unclear. My impression is that it was somewhat longer.

Q Three months?

1
2 A Possibly.

3 Q And --

4 A There was a delay.

5 Q Mr. Birnbaum, you first learned about this
6 in June 29th of 1975. Since the Freedom Information Act
7 at that time you have made no more similar Freedom Information
8 request to see whether or not the Government is opening up
9 any more of your letters?

10 A I haven't made it since, no.

11 Q You have been corresponding regularly with
12 the Soviet Union between the period these programs operated,
13 the Mail Intercept Project, it operated from 1953 to 1973?

14 A I corresponded from time to time on academic
15 business with the Soviet Union, yes.

16 Q And you corresponded more than one time with
17 Professor Ugrinovitch?

18 A Yes.

19 Q And what position did Professor Ugrinovitch
20 hold at Moscow University?

21 A He was a professor in the chair of religious
22 studies at Moscow University which they call scientific
23 atheism.

24 Q During the time you were chairman of this
25 committee you regularly corresponded with Professor Ugrinovitch?

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A Yes.

Q Professor Birnbaum, this outrage and shock that you expressed at the opening of your mail, did you consult any medical doctors as a result of that?

A No.

Q Or more psychiatrists?

A No.

Q I believe this was covered but you are not claiming any loss of employment whatsoever?

A No.

Q Now, you also testified that you have greater fear of recurrence of these acts, is that correct?

A I used the words "apprehension and anxiety".

Q Are you aware that at least two Congressional committees and at least two executive branch investigating committees have indicated that this program was terminated in 1973?

A I am aware that it has been said that the program has been terminated by this agency.

Q Are you aware there is no evidence that this program has continued after 1973?

A As far as I know. There is not evidence of it.

Q Are you aware that the Attorney General has

indicated in 1976 that if he found anyone doing this again he would prosecute them for violation of the law?

A I wasn't aware of it, but I am pleased to hear it.

Q Does that lessen your apprehension, Professor Birnbaum?

A It could lessen my apprehension. I think it might.

Q Did you make any attempt to find out whether or not the program was operating after you learned that your letter was opened?

A You know as well as I do since you are a federal employee that the federal machinery is large, cumbersome, difficult to follow. A single citizen faced with the Federal Government can hardly himself launch an investigation.

Q I will return to my question:

Did you make any attempt to find out whether or not this program of mail, of intercepting mail between the United States and the Soviet Union was terminated after you received notification that your letter was opened in 1975?

A I read a few things about it.

Q And what did those few things say?

A I have the impression that as I follow the news, there was a certain amount of public and confessional discussion of this and the Government was retrieving on this issue.

Q So you were aware in 1975 that the program had been terminated?

A I was aware at some point in 1975 that there was a large public discussion of this issue and that Government statements had been made, attempting to reassure Congress and the public that nothing much was now happening.

Q Do you have any evidence that the program was not terminated?

A I don't have any evidence that the program has not been terminated, no.

Q Have you been the subject -- I will preface that, this mail opening took place in 1970. Is that correct?

A Yes.

Q The letter that was dated, what time in 1970?

A The letter dates September of 1970.

Q Let us go back to the early part of '70. Since the early part of 1970, have you been the subject of a formal investigation by the CIA?

A Not that I know of, no.

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Q Have you been the subject of a formal investigation by the FBI?

A A formal investigation? Not that I know of.

Q Have you been interrogated by anyone from the FBI?

A No.

Q Have you been interrogated by anyone from the CIA?

A No.

Q Have you been interrogated by any agents from any Federal Government Intelligence or investigative agency?

A What dates?

Q Since 1970?

A I had an IRS audit, but that is all.

Q I think you also agree that you were not even approached by anyone from the CIA since 1970?

A No, you are right, I was not approached.

Q Have you been approached by anyone from the FBI since 1970?

A No.

Q Have you been approached by anyone else from an intelligence agency since 1970?

A Only on Civil Service Commission people

1
2 seeking information on students.

3 Q Since the mail opening in 1970, have you been
4 harassed by the CIA?

5 A No.

6 Q Have you been harassed by the FBI?

7 A No.

8 Q Just so we are clear on a couple of points,
9 Professor Birnbaum, the two letters that were copied by
10 the Central Intelligence Agency, I agree we have no dispute
11 that we opened up the envelope and that we copied the
12 letters and put them in a CIA file, but those two letters
13 were in one envelope, were they not?

14 A That's correct.

15 Q And you mailed and received from Professor
16 Ugrinovitch more than just that one envelope?

17 A Not much more but a couple more.

18 Q And those did not show up on any request that
19 you filed with the Central Intelligence Agency?

20 A No.

21 Q Was there any -- anything of intelligence
22 interest in those other letters that would lead the CIA
23 not to give those up?

24 A There was nothing intelligence interest in
25 this letter that the CIA opened.

Q But you see no reason why if the CIA didn't open other letters they wouldn't have given them up at the same time they gave these up?

A No, but the way they operate it is not clear.

Q These letters, once again to clarify the point, these letters that you sent to Professor Ugrinovitch, they were not addressed to him, is that correct?

A The letters that were opened you mean?

Q Yes.

A No, they were copies of letters that I addressed to other colleagues that I sent to him for his information.

Q Those letters, I take it, are part of the International Sociological Association?

A Yes.

Q They are free to be examined by anyone from the International Sociological Association that wants to see them?

A Of course.

Q Do you have any knowledge whether they have been seen by others from the International Sociological Association?

A I think one or two other people from the committee has seen them, yes.

1

2

Q You are a sociologist by profession?

3

A Yes.

4

Q I take it Professor Ugrinovitch is also a

5

sociologist by profession?

6

A Yes.

7

Q And Professor Moln in Canada is and Professor

8

Julian in Romania, he is also a professor. Right?

9

A Yes.

10

Q Now, you mentioned, Dr. Birnbaum, that there

11

was some discussion of academic freedom involved in your

12

outrage and shock. Has anyone from the CIA approached

13

you about what you should teach in your class? Since

14

1970?

15

A Nobody has approached me, no.

16

Q Has anyone from the FBI approached you about

17

what you should teach in your class?

18

A No.

19

Q Has anyone from anywhere else in the Federal

20

Government approached you on what you should teach in your

21

class?

22

A No.

23

Q Has anyone from the Federal Government

24

approached you about what you should write or research?

25

A No.

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2 Q Has anyone from the CIA or FBI, to your know-
3 ledge, approached your students?

4 A That I don't know.

5 Q You have no knowledge of --

6 A I have no knowledge of that.

7 Q Dr. Birnbaum, you stated it was hard to live
8 with the indignation and shock which you felt?

9 A Yes.

10 Q Have you spent sleepless nights?

11 A Let's say my reaction during the day was bad
12 enough.

13 Q You do not recall any sleepless nights as a
14 result of this?

15 A No.

16 Q And you didn't go to a doctor or have to see
17 a psychiatrist?

18 MR. JORDAN: I object to the representation.

19 MR. BOESE: All right.

20 Q You also stated in your direct examination
21 that you had no suspicion that anyone was opening your
22 mail?

23 A Yes.

24 Q Does that include, you had no suspicion that
25 Soviet authorities were opening your mail?

1
2 A I have no suspicion that Soviet authorities
3 were opening mail sent to a professor at Moscow University,
4 no.

5 Q Would you suspect that mail sent from Moscow
6 to yourself would be opened by Soviet authorities?

7 A Of course they have a system where citizens
8 do not enjoy political liberty. We have one.

9 Q Wouldn't that system not only include the
10 right to send mail but to receive mail by Soviet people?

11 A Of course.

12 Q So if you presume mail out of Soviet Union
13 was being seen by Soviet Secret Police, you would presume
14 that mail going into the Soviet Union was being seen?

15 A A lot of American Academics have had experience
16 in the necessary business of contact with the Soviet
17 Union, I don't know many of whom are opponents of the
18 system and our experience has been if one corresponds with
19 them in their official address, mail, books, communications
20 are more likely to get through. That is all I can tell you.

21 Q Since the opening of the mail of 1970, Professor
22 Birnbaum, have you learned of the opening, -- have you sent
23 any telegrams, not sent any telegrams, not mailed any letters
24 or not mailed any telephone calls because of your knowledge
25 that the mail was opened?

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A No, I wouldn't say so.

Q So you still feel free to correspond with Professor Ugrinowitch or other colleagues in the Soviet Union or other colleges in foreign countries or other colleges in this country?

A I do but I have worried about what might be happening without my knowledge or consent.

Q Have you ever been denied the right to travel since 1970, Professor Birnbaum?

A No.

Q Have you ever been harassed in your attempts to travel to a foreign country?

A No.

Q Has anyone in any federal agency said you cannot correspond with anyone in the Soviet Union, since 1970?

A No.

Q Can you recall anything specific in which your life was changed other than in a psychological sense since you realized that your mail was opened in 1970?

A Talking about changes every life is pretty general. I would say that I suffered a certain disappointment and feeling about the frugality of our free institution after this happened.

Q Has anyone interfered with your right to vote

1
2 since 1970?

3 A No.

4 Q You ever felt free to vote in any election
5 in which you desired?

6 A Yes.

7 MR. BOESE: I have no further questions, your
8 Honor.

9 MR. JORDAN: No redirect, your Honor.

10 THE COURT: Next witness.
11

12 (Continued on next page.)
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MR. WULF: I call Mr. Leonard Avery.

[31]

B. L E O N A R D A V E R Y, called as a witness, being
duly sworn by the Clerk of the Court, testified
as follows:

DIRECT EXAMINATION

BY MR. WULF:

Q Mr. Avery, are you a plaintiff in this
action?

A Yes.

Q Would you state your address, please.

A 52 Grover Terrace, Minneapolis, Minnesota.

Q What is your present employment?

A I am an artist in my own firm, Small
Advertising Agency.

Q Minneapolis?

A Minneapolis.

Q What has your past employment been for the
past decade?

A All been in advertising as an artist.

Q Did you serve in the Armed Forces of the
United States any time in your life?

A Yes, I did. I was in the Navy for four years
during World War II.

Q What did your duties consist of at that time?

A I was a signalman on the staff of a convoy

2 Commodore and served in convoy duty in the Atlantic.

3 Q How many crossings did you make on your convoy
4 during that period of time?

5 A I believe I crossed the Atlantic something
6 like twenty-six times.

7 Q Where did you live in 1966, Mr. Avery?

8 A Also in Minneapolis.

9 Q Were you married then?

10 A No, sir.

11 Q Have you been married?

12 A Yes, I have.

13 Q What is your present marital status?

14 A I am divorced.

15 Q Do you have children?

16 A I have five children.

17 Q Is one of your children named Michael.

18 A That's right.

19 Q Where was Michael in 1968?

20 A Michael was in Russia in 1966 at the University
21 of Moscow Law School under a scholarship sponsored by the
22 Inter-University for Foreign Travel Committee, which is
23 under the sponsorship of the State Department.

24 Q The State Department of the United States?

25 A Right.

1
2 Q How long did Michael spend at Moscow State
3 University?

4 A He spent the entire school year there, from
5 the fall of '68 until the beginning of the summer of 1969.

6 Q How old was he at that time?

7 A Twenty-three.

8 Q Did you and Michael exchange correspondence
9 during the year that he spent in Moscow?

10 A Yes, we did.

11 Q How often did you write to each other, as
12 far as you can recall?

13 A Perhaps a half dozen times that I would write
14 to him and he would answer me.

15 Q Was he also writing to his mother then?
16 Do you know?

17 A Yes. And two other members of the family,
18 I am sure. His brothers and sisters.

19 Q Where does he stand in rank among your children?

20 A He's the oldest.

21 Q Did Michael give you any special instructions
22 how you were to write to him?

23 A Yes. We were told that we should write to
24 him in care of the American Embassy in Vienna, Austria, and
25 that the American Embassy there would deliver his mail to

1
2 him at the University in Moscow via -- I believe they
3 called it Diplomatic Pouch. The purpose being that it
4 would then not have to go through the Soviet mailing
5 facilities.

6 Q Why did they want to avoid it going through
7 the Soviet mails.

8 A To prevent the Soviet authorities from
9 opening and reading the mail.

10 Q What did you and Michael write to each other
11 about generally?

12 A Well, --

13 Q During that year?

14 A I should think the typical things that
15 fathers and sons might write to each other about. He wrote
16 to me about what he was doing in school and what exper-
17 iences he was having in Russia as a student and things
18 he was seeing. And I wrote to him about my activities in
19 this country and what I was doing in my work and play, I
20 suppose, and the usual intimate correspondence between a
21 father and a son.

22 Q Did you consider those letters which you and
23 Michael exchanged to be private letters?

24 A Of course. I considered them very private.

25 Q Who did you think would read the letters that

1 you wrote to him?

2 A Well, he would read them.

3 Q Did you ever intend to publish any of the
4 letters that you wrote to Michael or that Michael wrote
5 to you?
6

7 A No. This was a private correspondence.

8 Q Do you recall that whether or not the letters
9 you received from Michael that year, when you did receive
10 them, were they sealed in sealed envelopes?

11 A As I recall, they were.

12 Q Did you have any reason to think that year
13 that the United States Government, officers of the
14 United States Government were opening and reading letters
15 that you would exchange with Michael?

16 A It would never have entered my mind.

17 Q Did you learn at some time that in fact the
18 CIA had opened and read mail written between you and
19 Michael?

20 A Yes, I did ultimately learn that.

21 Q Do you remember when you learned that?

22 A In July of 1975.

23 Q Could you say how you learned it, please?

24 A Well, I learned it because Michael telephoned
25 me to tell me he had just learned that his mail had been

opened by the CIA.

Q Do you know he learned that fact?

A He had written to the CIA to ask if they had a file on him. This is again in connection with the Freedom of Information Act. And their reply was to send him, I believe, a half dozen or so letters that they had in the -- opened and copied.

Q Was there among the half or so dozen letters that he had written to you --

A Yes, one was a letter written to me.

Q Let me show you plaintiff's Exhibit A for identification. And if you look at the third, fourth and fifth pages, could you say whether you recognize those documents?

A Yes. This is a letter that he wrote to me that was opened.

MR. BOESE: I have no objection, your Honor.

MR. WULF: We offer this.

THE COURT: What number?

MR. WULF: Plaintiff's Exhibit No. 8.

THE COURT: What is the date?

MR. WULF: The date of the letter is December 11, 1963.

THE COURT: January 29th memo?

MR. WULF: The memorandum is 1. The covering memorandum is January 29, 1969.

THE COURT: Okay.

THE CLERK: Plaintiff's Exhibit for identification marked in evidence.

MR. WULF: Thank you.

Q Let me again hand this exhibit to you, Mr. Avery. And would you identify this page and the next two pages? Simply what does the document consist of?

A This is the envelope addressed to me in Minneapolis written by my son.

Q Written from where?

A Written from the University of Moscow. There is some Russian there that I can't read but I assume that that's the return address. And this is the beginning of the letter in my son's handwriting.

Q Two page letter from him to you?

A That's right.

Q I'm not going to ask you to read it, but the jury will have copies.

Mr. Avery, when Michael that day on the telephone stated that he had learned that the CIA had read this letter that he had written to you, what was your reaction to that news?

1
2 A Well, I was appalled that the Government
3 would do such a thing. Never -- I never thought it would
4 happen in this country where it was a Democratic country.
5 It's supposed to be a free country. And I was outraged that
6 they had actually opened my mail, my private mail to my son.
7 And particularly in view of the fact that we had taken pre-
8 cautions to send mail, to keep it out of the hands of the
9 Soviet authorities, then to discover that the United States
10 Government was committing the same offense. I found it
11 inexcusable, suffered a great deal of disappointment over
12 this because I -- I -- shattered my faith in the United
13 States Government.

14 Q As far as you know, Mr. Avery, did you suffer
15 any identifiable financial injury because of the fact that
16 the CIA opened and read this letter of yours?

17 A No, I did not.

18 Q Did your employment of your business suffer?

19 A No.

20 Q Did you lose any jobs?

21 A No.

22 Q Were you ever investigated or interrogated,
23 as far as you know, by CIA or FBI agents?

24 A No.

25 Q Was your right to vote ever impaired?

2 A No.

3 Q As a result of learning that the CIA had
4 opened this personal letter between your son and yourself,
5 did you suffer any change of attitude about your day to day
6 living, your attitude about the function of Government?

7 A Well, yes. My attitude changed. I thought
8 if they could open my mail, perhaps other things can
9 happen. I mean tap my phone or interfere with other con-
10 stitutional rights that I have. And I became very appre-
11 hensive about this and wondered if this was all that was
12 going to happen or if more things might happen to me. It
13 shook my faith in the sincerity of the Government to protect
14 my constitutional rights which I have always assumed was
15 being done and I had never worried about it before.

16 MR. WULF: Thank you. I have no further
17 questions.

18 CROSS-EXAMINATION

19 BY MR. BOESE:

20 Q Good morning, Mr. Avery.

21 A Good morning, Mr. Boese.

22 Q Mr. Avery, you did not write this letter, did
23 you? This letter was written by your son?

24 A No. This is a letter from my son to me.

25 Q You received the letter?

10

Avery-cross/Boese

1 A Yes, I did receive the letter.

2 Q And you did not notice any inordinate delay
3 in the receiving?

4 A No, I don't think so.

5 Q Did you keep the letter?

6 A I am quite sure my mother must have kept it.

7 Q You did not keep it? All right.

8 You are divorced from your wife?

9 A That's right.

10 Q You did not notice that there was any damage
11 to the envelope itself, did you?

12 A No. I was not looking for any such thing.

13 Q As a matter of fact, you -- did Michael call
14 you and let you know there was a letter coming before you
15 received the letter?

16 A Called us from Russia to tell us? No.

17 Q Mr. Avery, what is your profession?

18 A I am an artist.

19 Q And you have never applied to the Federal
20 Government for employment?

21 A No, I never have.

22 Q You never -- specifically, you never applied
23 to the FBI for employment?

24 A No.

2 Q You don't presently intend to?

3 A No, I do not.

4 Q Now, you -- your son Michael also had been
5 in the Soviet Union twice; is that correct? In 1965 and
6 again in 1968?

7 A Yes. He had been there a total of two times.
8 Yes.

9 Q You did not correspond with him during the
10 period in 1965 during -- during the period of '65?

11 A '65? No. At that point he was there for
12 a very, very short period of time and moving about on a
13 language scholarship from the University of Kansas.

14 Q And how often did you correspond with him
15 in the year he was there in 1968?

16 A I would say maybe a half dozen times. I am
17 not a great letter writer. I am sure his mother wrote to
18 him perhaps more.

19 Q When Michael advised you that one of the
20 letters to you had been opened, did he also advise you that
21 any of your letters to him had been opened or that any
22 letters from him to you had been opened except this one?

23 A Well, he told me the letters from him to me
24 had been opened. And he told me others of his letters that
25 he had written to friends in the Soviet Union after his

return to the United States had been opened.

Q But those were his letters and not yours?

A His letters.

Q So even though you wrote to him many times and he wrote back many times, we are just dealing with this one letter that was opened.

A That is correct.

Q You have never submitted a Freedom of Information Act yourself?

Q I presume you were in the courtroom when Mr. Birnbaum testified? You understand what the Freedom of Information Act is?

A Yes.

Q You understand what the Freedom of Information Act is and your rights under the Freedom of Information Act during this period of time since 1975?

A Yes.

Q You never submitted any Freedom of Information Act request to the FBI either, have you?

A No.

MR. BOESE: Excuse me.

Q You stated that -- I believe that you are apprehensive about other surveillance by the Federal Government; is that true?

2 A That is true. I feel that when something like
3 this happens it could be a harbouring of something else
4 happening.

5 Q Were you approached by any -- or investigated
6 or talked to by any FBI officials?

7 A Not to my knowledge.

8 Q I don't want to go into this litany with
9 the -- the same as with Mr. Birnbaum, but you -- similarly,
10 you were not approached to talk to or interrogated by anyone
11 from the CIA?

12 A No, not that I know of.

13 Q Or anyone else from the Federal Government?

14 A No.

15 Q Did your son receive a file on him of anything
16 from the FBI or the CIA about investigations?

17 A I am not aware of that.

18 Q All right. Are you aware that if you had
19 asked the FBI for reports on you, that they would have
20 given them to you?

21 A Yes.

22 Q In all probability.

23 A I am sorry. I am aware that my son has a
24 file from the CIA that he received.

25 (Continued on next page.)

2 Q So then despite your apprehension about other
3 surveillances, you made no attempt to find out whether there
4 was any other such surveillance?

5 A That's right.

6 Q Did -- other than the simple opening of the
7 mail, did you have any other basis upon which to base this
8 apprehension of other surveillance?

9 A No. But I considered that quite a sufficient
10 basis in itself.

11 Q I trust that in your direct examination what --
12 with Mr. Wulf's statement of your rights, he asked you about
13 your right to travel and your right to vote and your
14 right to communicate, and I believe you answered that you
15 did not feel that those rights were taken away from you?

16 A No. I don't feel that they were.

17 Q But then right after that you also said that
18 you were fearful about your rights. What other rights are
19 you fearful were taken away from you if those rights have
20 not been taken away from you?

21 A Well, they could be taken away at any time just
22 as Michael's letter was opened without me being given any
23 notice or --

24 Q That possibility exists with or without the
25 mail opening, does it not?

A That possibility exists at all times.

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2 Q Did you -- how many times do you correspond
3 with your son now?

4 A Oh, not often. We correspond a lot via the
5 telephone now. Then we correspond monthly or twice a month.

6 Q So I think we talked about the -- this yesterday
7 at our talk yesterday, and we could say that you probably
8 corresponded with your son, say, 50 times since you realized
9 your mail was opened in 1975?

10 A Probably.

11 Q And during that period of time did you discuss
12 with your son any sensitive matters?

13 A I don't know how to answer that question. I
14 don't think we discussed anything that we would not want
15 anyone else to hear on the phone.

16 Q Mr. Avery, at your deposition yesterday when
17 I asked you during that period, have you discussed with him
18 sensitive matters, you answered unequivocally, yes?

19 A I am sorry. The answer -- I will stick by that
20 answer.

21 Q In the two years since you realized your mail
22 was opened, has your apprehension gone away or diminished?

23 A Well -- I think I could -- you know, I'm living
24 with it. It's not constantly on my mind. But I think a
25 great deal of it is not so much -- not so much apprehension

1
2 but the disappointment that this could happen to an American
3 in America. That these things could happen. It's a really
4 disappointing thing. You feel like you've been betrayed by
5 your Government when this happens to you.

6 Q Since you realized your mail was opened in 1975,
7 you have not felt any apprehension about seeing or associating
8 with your son, have you?

9 A No.

10 MR. BOESE: I have no more questions. Thank
11 you.

12 THE COURT: Thank you, sir.

13 MR. WULF: I have no redirect.

14 MR. BOESE: I am very sorry. I do have one
15 more -- it is not a grandstand play. I hope I was
16 under --

17 CROSS-EXAMINATION

18 BY MR. BOESE CONTINUING:

19 Q Yesterday we discussed a statute, 19 USC432.
20 We talked about that. I would like to read to you one portion
21 Any of the officers or persons authorized to
22 search, may stop, search --

23 MR. WULF: I object to this. If I may, I am
24 going to object before Mr. Boese goes any farther
25 because I know what he is going to read. He's going

1
2 to read a statute that relates to the United States
3 Customs Service. The United States Customs Service
4 is not involved in this. We are talking about the
5 Central Intelligence Agency. I think he is trying
6 to suggest that an agency has some authority to open
7 the mail. This is a dubious proposition which is
8 pending before the Supreme Court. And I think it's
9 prejudicial in this case for him to proceed with the
10 question he has in mind.

11 MR. BOESE: Well --

12 THE COURT: It may affect the steps of security.

13 I will permit it.

14 BY MR. BOESE:

15 Q I will quote from it, Mr. Avery. It says,
16 essentially they are authorized to stop, search and examine
17 any vehicle, beast or person on whom they suspect there is
18 merchandise which is subject to duty or shall have been
19 introduced into the United States in any manner contrary
20 to law, or by -- or upon such beast or vehicle, or to search
21 any truck or envelope wherever found in which he has reason-
22 able cause to suspect there is merchandise which is imported
23 into the country.

24 Were you aware of that statute, Mr. Avery?

25 A No, I'm not aware of that statute.

1
2 Q Would you be outraged if without a warrant
3 a Customs Official searched the envelope coming into the
4 United States from your son?

5 MR. WULF: I object.

6 THE COURT: Sustained. You will have to rephras
7 it. For the purpose of obtaining contraband.

8 Did your son ever send you contraband?

9 THE WITNESS: No.

10 THE COURT: Did you ever send your son contra-
11 band?

12 THE WITNESS: No.

13 THE COURT: All right, anything further?

14 MR. BOESE: Well, your Honor, they can look
15 whether or not there is or is not contraband in the
16 envelope. If they open the envelope. I just want
17 to know whether he would be equally --

18 THE COURT: They are authorized to look for
19 contraband. They are not authorized to read letters.
20 If they are authorized at all to inspect for contraband.

21 MR. BOESE: I will drop it. I have no more
22 questions.

23 THE COURT: All right.

24 MR. WULF: No more questions.

25 THE COURT: Thank you. Next witness.

(Witness excused.)

[49]

MR. NEUBORNE: Mary Mac Millen please.

M A R Y R U L E M A C M I L L E N , called as
a witness, being duly sworn by the Clerk of
the Court, was examined and testified as
follows:

DIRECT EXAMINATION

BY MR. NEUBORNE:

Q Miss MacMillen, you are one of the plaintiffs
in this case, aren't you?

A I am.

Q And where do you live?

A My legal residence is Hanover, New Hampshire.
I am temporarily living in Cambridge, Massachusetts.

Q What is your educational background?

A I graduated from Wells College in New York
in June of 1972, having taken my Junior the year before at
Dartmouth in Hanover, New Hampshire. I studied social and
Russian Culture in those schools.

Q What is your current employment?

A Placement coordinator for something called
the Institute for offcampus Experience and cooperative
education, which is a job placement service for students
who are seeking employment during the time off from their
college.

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Q Who sponsors this job placement?

A Northeastern University, Boston.

Q What other jobs have you held since your graduation from college?

A Between July, 1974 and July 1976 I was an Assistant Director of a mission at Wells College in Williamstown, Massachusetts.

Q After your graduation from Wells College did you visit the Soviet Union?

A I did. I visited January, 1973.

Q Could you tell us the nature of your trip to the Soviet Union? How did you come about to visit?

A I had been interested in Russian Culture. I was included with undergraduates at Wells in a student study tour of cultural and language of the Soviet Union.

Q Was the trip under the auspices of Wells College?

A Yes, it was.

Q How many people went?

A There were 13 women and one professor.

Q and while you were --

THE COURT: The professor was a male?

THE WITNESS: A male.

Q While you were in Moscow, Miss MacMillen, you

1
2 met a Russian citizen with whom you established a close
3 personal friendship?

4 A I did.

5 Q And how did you come to meet your Russian
6 friend?

7 A Purely by chance on a street in Moscow.

8 Q When you returned from your trip to Russia to
9 the United States, did you communicate with your friend?

10 A I did.

11 Q When was the first time you communicated with
12 your friend after you returned to the United States?

13 A A few days later. The letter I believe I wrote
14 on the First of February. It was mailed the Fifth of February
15 from Hanover, New Hampshire.

16 Q That's 1973?

17 A '73.

18 Q What was the nature of that letter that you
19 wrote in early February of 1973?

20 A It was a purely personal letter. A personal
21 statement about my feelings -- thoughts and feelings about
22 our relationship. Also my comments on the cultural aspects
23 of the Soviet Society that I had been exposed to. Just a
24 personal statement.

25 Q Now, Miss MacMillen, I'm going to show you a

summary of a letter which you wrote in early February, 1973.

I ask you, do you know who prepared the summary of the letter?

A I don't know exactly who it was who prepared it. No. I have been told that it was an agent of the C.I.A. That's all I know.

Q Could you take a look at this summary? Take a moment and reread the summary.

Is it an accurate summary of the letter which you wrote in early February of 1973?

A Yes.

MR. NEUBORNE: At this point, your Honor, Plaintiff offers Plaintiff's Exhibit 15 for identification in evidence.

MR. BOESE: We have no objection to the introduction of that letter.

MR. NEUBORNE: Ladies and gentlemen, Plaintiff's Exhibit 15 --

THE COURT: Now, this is what we call a redacted letter summary. Not the original letter. I am not allowing counsel, after discussing it, to put the full original letter in because it has in it personal statements and because it may endanger methods of getting manuscripts from Russia. You are not to take that into account in assessing damages. You don't have that

1
2 information. You just have the summary. You will
3 have to base your decision on the letter as you hear
4 it, not on what you think might be in the letter.

5 Is that clear? Don't speculate on anything
6 that is not in the -letter.

7 MR. NEUBORNE: With the Court's permission,
8 this summary -- it is agreed, it is a summary that
9 was prepared, Miss MacMillen's letter by a Central
10 Intelligence Agent after the letter was opened and
11 had been made available to counsel during the pretrial
12 discovery aspects of this case.

13 (Continued on next page)

14 MP fls.14

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2 Q After you wrote your early February letter,
3 Miss MacMillan, did you receive an answer?

4 A I did. My friend wrote me in the latter part
5 of the Spring of 1973, May or June, of that year.

6 Q Did you answer his letter?

7 A I did during the Summer, mid-Summer of 1973.

8 Q At the close of the Summer of 1973, what
9 project did you engage in?

10 A In September, '73 I left for a year abroad.
11 I spent the academic year in Dublin studying Irish
12 Folklore under a Rotary Fellowship which is supported by
13 Rotary International.

14 I was allowed to study at the University
15 Collage in Dublin.

16 As a way to pay back the Rotarians for
17 supporting me in Ireland, I was expected to speak at a
18 few Rotary Clubs during that year. I spoke actually quite
19 frequently to Rotary Clubs in both the Republic of Ireland
20 and Ireland.

21 Q How long were you in Ireland?

22 A September, '73 to July, '74.

23 Q From the period September, '73 to July, '74,
24 the period you were in Ireland, did you contact your
25 friend?

A No.

Q Did you attempt to telephone your friend?

A No. My reasons --

Q Did you return home at all during September, 1973 to July, 1974?

A Yes, when I returned home to America for Christmas I did telephone my friend with a friend, American friend of mine, and the two attempts we made were thwarted, the line was cut both times.

Q During the period September, 1973 to July, 1974, this is the period you were in Ireland, did you contact your friend at all other than this single telephone call?

A No, I did not.

Q I take it you didn't write to your friend during this period?

A No.

Q Why not?

A Well, I was ill at the time throughout most of the time that I was there and I was upset at being ill.

I certainly didn't want to be ill because I had academic and personal responsibilities and I just didn't want my friend to know that, that the experience was not a wholly and good one for me.

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MacMillan-direct/Neuborne

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Q When did you return to the United States from Ireland?

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A Around July, '74.

5

Q Did your health improve?

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A Yes.

7

Q When did you write to your friend again?

8

A During the Fall of that year I had moved to Williamstown, Massachusetts and was working as an assistant director of Williams and I wrote sometime during that period.

12

Q Fall, 1974?

13

A Yes.

14

Q When is the next time?

15

A I believe during the Spring of '75.

16

Q When did you first become concerned about the CIA opening your mail?

18

A Well, I never suspected or never assumed my mail was being opened. I only really became aware of it when I noticed an article in the Williams College student newspaper which is called the William Record, an article about the Freedom of Information Act.

23

Q I show you a copy of an article from the Williams College Record dated October 21, 1975.

24

25

I ask you, is this the article that brought the

MacMillan-direct/Neuborne

Freedom of Information to your attention?

A It is.

Q After you read this article, what did you do?

A I wrote to the first name listed there,
Gene F. Wilson, CIA.

Q Is that why you wrote to the CIA rather than
some other agency?

A Yes.

Q Did you expect your letter would bring forth
a reply that they had a file on you?

A No. I didn't really believe there would be
a file. I certainly didn't believe there would be a
letter. I thought there might be a mention I applied for
a visa to the Soviet Union.

I was shocked.

Q Did you receive a reply to your letter to the
CIA?

A Yes, I did. The first reply I received said
they couldn't help me until I notarized a statement that I
was who I was.

I prepared a notarized statement and I wrote
them in the latter part of November, 1975 and received
their answer.

Q I'm going to show you a copy of a document

1
2 that is marked Plaintiff's Exhibit 16 for identification
3 and ask you whether this is the letter which you received
4 from the Central Intelligence Agency on January 7, 1976?

5 A Yes, it is.

6 MR. NEUBORNE: Your Honor, at this point
7 Plaintiffs would offer the letter with the notification
8 to the Court of course we have deleted the name of
9 the addressee.

10 THE COURT: What are the exhibit numbers?

11 MR. NEUBORNE: 16. This is Plaintiff's
12 Exhibit 16.

13 THE COURT: All right, mark it.

14 MR. NEUBORNE: The document which we are
15 introducing in evidence will be made available to
16 you for your consideration during your deliberations
17 in this case.

18 Q The CIA letter is dated January 7, 1976, there
19 is a stamp on it. I take it you received it either on the
20 7th or shortly thereafter?

21 A Yes.

22 Q The letter notified you that one of your
23 letters to your friend has been opened?

24 A Yes.

25 Q Which letter was it?

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2 A The first. The February letter. The first
3 one I had written.

4 Q First back in --

5 A February, '73.

6 Q Since you received that letter from the CIA,
7 since you received the notification from the CIA, have
8 you communicated with your friend in the Soviet Union by
9 mail?

10 A Not by letter mail. As much as I can remember,
11 at one point since January, 1976, I believe I sent my
12 friend a birthday card which was store bought, which I
13 would have signed and that is all the communication --

14 Q There was no message in the card?

15 A No.

16 Q Have you communicated with him any other
17 way?

18 A Yes, in January, 1977, I asked my best
19 friend to hand deliver a letter. She happened to be
20 going, with Amherst, on a tour and I asked she hand
21 deliver a letter which she did.

22 Q Since January, 1976 you communicated with
23 your friend just twice, once by a birthday card and another
24 time this hand carried letter?

25 A Yes.

MacMillan-direct/Neuborne

Q Had you mailed anything to him other than the birthday card?

A No.

Q Did you want to write to your friend during this 18 month period?

A Very much. There have been many, many, many times that I would like to have shared my experiences with my friend. That is only natural. But I haven't felt that I have been able to.

I certainly, spontaneously, freely, cannot.

Q Why haven't you written him during the past year in the mails?

A Because I can only suspect that because the CIA did it once they will do it again and it is distasteful to me that the thought anyone other than my friend and myself seen the communication.

Therefore, I don't feel that I can do it again.

Q Will you write to your friend in the future? The Government lawyer in this case has assured you that the CIA has stopped opening the mail, and I told you as far as I know the CIA is not opening the mail any more.

Will you write to your friend in the future now you know the mails are not opened?

A I am not sure I will because I am not sure I

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2 believe that. I want to believe that. I want to believe
3 it won't happen again. But my trust has definitely been
4 shattered.

5 I certainly believed beforehand that that
6 never would happen and it did happen. Therefore, I just
7 can't trust what I am told.

8 Q I would like to take you back now to January,
9 1976, the day you received a letter from the CIA telling
10 you that your mail had been opened.

11 What were you doing that day, do you recall?

12 A I was interviewing perspective students who
13 wanted to enter William College.

14 Q In connection with your duties?

15 A Yes.

16 Q About what time of day did you receive this?

17 A I remember it was in the morning, I believe
18 around 11 o'clock, getting on towards noon. I was between
19 interviews at the time and went downstairs to get my mail
20 and there was a package, a rather large envelope.

21 I opened it and my initial reaction was
22 absolute outrage. I was livid. I jumped out of the chair
23 and ran into a friend and ranted and raved.

24 It seemed so wrong that I would be the subject
25 of a government investigation. It invaded my privacy. I

1
2 knew I was innocent. There was certainly nothing about
3 my past that would have merited their surveillance.

4 I tried to rationalize it at that moment
5 sitting there in my office, but I couldn't rationalize it.
6 I was furious.

7 Q Had your sense of anger diminished in the
8 eighteen months since?

9 A Not a bit. It fluctuates sometimes, but just
10 the thought of going through this experience or bringing
11 it up angers me.

12 Q Apart from the anger that you felt learning
13 that your private mail has been opened, did you feel any
14 other emotion?

15 A Yes, I definitely felt very embarrassed --
16 humiliated in fact -- because of the fact the nature of my
17 letter was only -- was one of the most personal letters I
18 have ever written. Certainly it was only personal and
19 because of the --

20 MR. BOESE: I object to this answer on the
21 grounds the jury cannot judge the personal nature of
22 the letter and we have to rely on her testimony.

23 THE COURT: In evaluating her testimony
24 consider the disadvantage that the Government is under
25 in its cross examination.

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MacMillan-direct/Neuborne

Will you do that?

MR. NEUBORNE: Might we point out to the jury the Government has a copy of the letter?

THE COURT: I won't permit it.

MR. BOESE: The Government can't use that copy of the letter. Indeed, we have agreed we will not disseminate it and kept it closely held among ourselves. We can't use that letter.

THE COURT: Yes.

Q This sense of embarrassment that you felt by having your personal letter read by an agent of the CIA, has that sense of embarrassment persisted?

A Of course. In light of the fact of going through the experience it's been read by more people than before. Before it was supposedly one CIA agent. I don't know that, I take that on faith, but since the experience it's been read by at least you -- yesterday you read it and it was painful for me to allow you to read it, and others in the Court might have to read it. It makes me feel personally violated.

THE COURT: Ladies and gentlemen, you cannot allow damages for the additional readings that took place as a result of the suit. You understand that. The fact the suit was brought and other people had to

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[63a]

read it is not compensatable. It is just what
happened up to that time when the Government openly
read it.

(Continued on next page.)

MacMillan-direct

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2 Q Just so we can at least clear this point up, [64]
3 if you feel so strongly about the privacy of the letter and
4 bringing this action has caused at least three additional
5 people to read it, me, Mr. Boese, and perhaps the Judge if
6 he thinks it is appropriate --

7 THE COURT: The Judge isn't going to read it.

8 MR. NEUBORNE: Thank you.

9 Q It is just Mr. Boese and me.

10 Why did you bring the case?

11 MR. BOESE: I don't think that is relevant.

12 THE COURT: I think that we had better stop
13 this line.

14 Q Apart from your embarrassment and your outrage,
15 what other emotion did you feel when you learned that your
16 letter had been opened?

17 A One is strictly bound to the other two, a
18 great disillusionment. I think I had always assumed -- I
19 have believed, and it's been important to me that the Civil
20 Rights that I had learned about all through my schooling
21 actually I held, I believed, I held them, I believed they
22 were my rights, and to find out my country was not so
23 different from the country of my friend was a shock and
24 disappointment that led to disillusionment.

25 Q Apart from the outrage and embarrassment and

2 MacMillan-direct

disillusionment, was there any other emotion you felt back in January of 1976?

A Yes. Again, this was quite close in time to its happening, I felt very much afraid. I was afraid for myself because all of a sudden the presence of the Government which I felt in its full force scared me. It scared me not in terms of my physical well being but a general fear as to what might happen to me other than what already had.

A fear that other letters I might write to my friend would also be opened.

So I think I was afraid of the consequences -- nothing that I could put my finger on right then -- but in the future my Government, with this knowledge, could affect me with not being able to work for the Government in a non-political sense which is a dream I have, work for a cultural exchange program.

I must say that more important than the fears I felt for myself were the fears I felt for my friend.

Q What kind of fear did you feel for your friend?

A Well, there was again kind of nebulous fears that I couldn't articulate except by saying in some way the fact that my letter had been read by my Government and at that time possibly distributed to other agencies of the

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2 Government could have some effect on my friend merely by
3 association with me, having been interested in Russia for
4 a long time and studying it as an 8th grade up through my
5 college career. I read enough in the literature to know that
6 association with Westerners can only put most Soviet citizens
7 at a disadvantage.

8 It was nothing clear cut but just a feeling
9 I had.

10 Q Your friend is a well known Soviet personality
11 who occasionally has spoken out against his own Government.

12 Didn't you suspect when you wrote your letter
13 to your friend that it would opened by the Soviet Intelligence
14 authorities?

15 A Suspect it, yes. I couldn't be sure, but yes,
16 I could suspect it. But there is a distinction.

17 Q Why in your mind is it different having the
18 Soviet people opening the mail than the C.I.A.?

19 A The first reason is our countries, the foundation
20 of our societies, are supposed to be diametrically opposed.
21 To find out they are not, in this sense, not far from each
22 other is -- it's hard to deal with.

23 But more important than that, I think is the
24 fact a foreigner reading my letter wouldn't have the same
25 reaction. An agent of the Soviet Government wouldn't be as

1
2 interested in my personal relation as an agent of my own
3 Government. It is a question of degree of embarrassment. And
4 a foreigner wouldn't understand the nuances of the language
5 where an English speaker would.

6 Q The letter that the C.I.A. opened, did you show
7 it to anyone before you mailed it?

8 A No.

9 Q Not even your best friend?

10 A No.

11 Q Did you intend to publish the letter at a future
12 date?

13 A No.

14 Q Did you give permission to the C.I.A. to make
15 a copy?

16 A No.

17 Q To make summaries of your letter?

18 A No.

19 Q Was the letter of any importance to you?

20 A The greatest importance.

21 Q Why?

22 A Because of my relationship with my friend, I
23 guess, also the first letter I had written to my friend. It
24 was important.

25 Q You testified that you experienced at least four

types of emotion, anger, outrage, embarrassment, disillusionment.

Did you experience any physical symptoms in the period shortly after your --

A I did.

MR. BOESE: I have to object to that. Plaintiff counsel indicated he will provide no expert witness which will link up any --

THE COURT: I will permit it. I'm going to permit the witness to tell you if she felt any physical reaction to her emotional and mental state as a result of this occurrence but you are not to allow any damages for any physical harm. Nor allow any damage for any possible medical expenses she may have had.

Q Can you describe for us the physical symptoms which you felt shortly after you learned the mail was opened?

A Yes, shortly after January, being somewhere around late February or early March, a skin and respiratory allergy that I've had actually for 11 or 12 years, it was exacerbated and flared up and became much more painful.

And another external manifestation was a respiratory allergy which I went to three doctors for.

Q That is enough.

We are not claiming damages, medical damages,

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2 in this case. The testimony about the doctors would be
3 irrelevant to our case.

4 You don't claim any out of pocket loss? You
5 didn't lose any money?

6 A No.

7 Q You didn't lose your job?

8 A No.

9 Q Your earning power hasn't gone down?

10 A No.

11 Q Apart from the reaction which you just described,
12 you haven't suffered any physical injuries as a result?

13 A no.

14 Q I take it your claim here is for the value of
15 your rights and the psychological distress you have been put
16 through because your letter has been opened?

17 A Yes.

18 MR. NEUBORNE: Thank you, I have no further
19 questions.

20 CROSS-EXAMINATION

21 BY MR. BOESE:

22 Q Good morning.

23 A Good morning.

24 Q Miss MacMillen, have you ever met a C.I.A. agent?

25 A Not that I know.

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Q Have you ever met an F.B.I. agent?

A Not that I know of, no.

Q Since 1973, do you know if you have been
investigated by the C.I.A.?

A Investigated? What is the definition -- having
had a letter opened?

Q No. Not opening your letters.

Have they harrassed you or come to talk to you
for any reason?

A Not that I know of.

Q You weren't subjected to an investigation
by the F.B.I. since your mail was opened?

A Not that I know of, but would I be told about
it?

Q You filed a Freedom of Information -- this one
letter?

A Yes.

Q You were aware under the Freedom of Information
Act you could have asked any other Government Agency for files
on you?

A Yes, I was aware.

Q Have you asked any other Government agency?

A I didn't want to. No, I did not.

Q You didn't do it?

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A I didn't want to do it.

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Q I don't mean to be a smart aleck, you prefer to have a fear then rather than be sure there is an investigation?

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A No, I wouldn't say that. The point being, what I found out from the C.I.A. was enough. I didn't want to deal with what the F.B.I. might tell me.

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Q You had a fear that they were investigating you?

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A That the F.B.I. was?

13

14

A I put it out of my mind. I didn't think about it. The C.I.A. was enough.

15

16

Q Did you have a fear that the C.I.A. was investigating --

17

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A No, it never crossed my mind from --

Q After your learning about the opening of your mail?

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A After January '76?

Q Yes.

A No.

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Q You said that you first wrote to your friend in January of -- February, 1973?

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A Yes.

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Q Then you telephoned him in December of 1973?

A Yes.

Q I believe you wrote to him once in '74, once in '75?

A Yes.

Q Then you learned about the opening of your letter in January of '76?

A Yes.

Q You sent him a birthday card with your name on it?

A Yes, I think so.

Q Then you sent a letter to a friend of yours in early 1977?

A Yes.

Q At anytime did anyone from the Federal Government tell you you couldn't write a letter to your friend?

A (No response.)

Q Did they write you a letter or come to you and warn you or tell you better not write to your friend?

A No, they didn't have to tell me verbally.

Q They --

A They made it psychologically difficult.

Q I take it they made it psychologically difficult by telling you that your mail was opened?

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A Yes.

Q You asked whether or not your mail was opened?

A Yes.

Q That was the only way they made it psychological
difficult to do so?

A No.

Q How else did they make it psychologically
difficult to do it, did they open other letters, come to see
you?

A There was a possibility they would open other
letters to me.

Q Have you been advised by your attorney that the
mail opening project was terminated two weeks after your
letter was opened?

A They told me that, yes.

(Continued on next page)

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MMsf
3am

MacMillen-cross

[74]

BY MR. BOESE: (Cont'd.)

Q Are you aware that a Senate Committee, Church Committee, which investigated the CIA, found no evidence that it wasn't terminated at that time?

A No, I was not directly aware of it.

Q Are you aware that the Rockefeller Commission appointed by the President to investigate intelligence matter concluded that the program was terminated two weeks after your mail was opened?

A I wasn't aware of that.

Q Are you aware that both of these reports came out before you received notification that your mail was opened in 1976?

A I was not aware of it.

Q So therefore when you became aware and when you had your shock, you were not aware that there were numerous published reports that were generally set forth in all the press indeed in headlines which specifically said this program had been terminated?

A Could you repeat your question?

Q Even though there had been at least, and probably more published reports in the press, in the international press generally in the headlines, that this program had been terminated and that there was no evidence

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2 to the contrary anywhere and after that time you received
3 information that your mail had been opened, you never knew
4 anything about those other published reports and never made
5 any attempt to find out about those published reports, is
6 that correct?

7 A The point is whether or not I could believe
8 those reports. That is my point. Yes, I might have seen
9 the headlines in the papers but it was different once I
10 felt the disillusionment, I am still not sure as I said
11 earlier that I believed that the operation had been
12 stopped.

13 Q Miss MacMillen, you testified that when you
14 telephoned the Soviet Union in 1973, the telephone line
15 was cut, you have no reason to believe that that was
16 American intelligence involved in any way in that, do you?

17 A There is no way I can know, it was either the
18 American or Soviet. I don't know. It could have possibly
19 been either.

20 Q Are you aware -- you are obviously aware
21 that your friend is a well-known Soviet dissident who
22 has taken positions contrary to his Government?

23 A I object to that, I wouldn't call my friend
24 that.

25 Q He was a prominent Soviet citizen?

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2 A Citizen, yes, dissident, that's not for you
3 or I to decide.

4 Q In colloquial -- I won't argue with you, but
5 hewas and is a prominent Soviet person who has taken
6 contrary positions to his Government in some area.

7 A Yes.

8 Q Your own attorney said that, I am using his
9 words.

10 A Yes, not when I knew him.

11 Q Now when you knew him, he wasn't?

12 A No, he wasn't.

13 Q Were you aware that his name was on a CIA
14 watch list?

15 A I was not aware of that.

16 Q Were you aware that your name is not on a
17 CIA watch list?

18 A I was told that by my family.

19 Q Are you aware we have no interest in Mary
20 Lou MacMillen but we do have interest in Soviets who take
21 position contrary to their Government?

22 MR. NEUBORNE: I object. It seems to me this
23 cross-examination goes to the weight of lawfulness.
24 It seems to me the Government is not --

25 THE COURT: No, it goes to state of mind.

4

1

2

I will permit it.

3

Q Could you answer the question?

4

A Was I aware that you had no interest in me?

5

Q Yes, that the CIA has no interest in Mary

6

Lou MacMillen but has a different interest in Soviet

7

prominent citizens who take contrary positions to their

8

Government.

9

A I wasn't aware that the CIA would have any

10

interest in that personal matter.

11

Q I am just talking about interest in the

12

person themselves, would you have suspected that they would

13

have some interest to that particular person?

14

A Not the CIA.

15

Q But you have no doubts that Soviet Intelli-

16

gence would have interest in that person?

17

A Probably.

18

Q And they probably would keep a fairly close

19

watch on who came to visit him and phone calls and also to

20

him?

21

A I would suspect it.

22

Q In 1974 I believe you testified you spoke to

23

a number of clubs?

24

A Yes.

25

Q I believe you also said in answer to

interrogatories that you now give speeches to various

1
2 alumnae clubs?

3 A No longer but between '74 and '76 when I was
4 at Williams, I did.

5 Q Do you make any claim that the CIA or FBI
6 attempted to interfere with your ability to give those
7 speeches?

8 A No.

9 Q You stated in our interview yesterday, or
10 deposition, yesterday, that, did you not, that --
11 withdrawn.

12 You stated here today that if, that one of
13 the great fears you had was fear for the safety of your
14 friend in the Soviet Union. Is that correct?

15 A Yes.

16 Q As a result of the mail opening?

17 A Yes.

18 Q Didn't you also tell me yesterday that if
19 the choice was communicating with your friend even if it
20 meant the Soviet Intelligence Agency was opening up you would
21 still communicate with him?

22 A Was that the way I phrased it?

23 Q It seems like that in my notes.

24 A Would you say that again?

25 Q I believe that you said, I don't think from

1 the transcript you are willing to risk the opening of mail
2 by the Soviet Union if the choice of having it opened-- is
3 that true?
4

5 A I think I was dealing with the embarrassment
6 of, I was willing to pay that price.

7 Q Well, I won't get into a discussion of this,
8 but the question right before we talked about the safety
9 of your friend in the Soviet Union, we discussed the safety?

10 A Okay, if I said it, I guess I said it.

11 Q You stated that you did write one letter, at
12 least one letter, and one postcard to the Soviet Union
13 since you became aware of the mail opening.

14 MR. NEUBORNE: I think it is a birthday card.

15 Q Well, one card.

16 A I sent a card which had no communication on
17 it. I gave a letter to my best friend to hand-deliver
18 to my friend. I did not use the mails, the American mail
19 system at all.

20 Q In your discussion of your fear for yourself,
21 you mentioned something about a job with the Federal
22 Government Cultural Exchange. Are you claiming at all
23 that because of this mail opening that that job has been
24 denied to you?

25 A I haven't applied for that job but it has been

1
2 implied by people I spoke to that that sort of thing could
3 happen. It is a fear I have that possibly it could.

4 Q Would this fear and other fears of apprehension be alleviated if the Central Intelligence Agency
5 and the FBI and Department of Justice turned over each and
6 every copy of your letter to you at the close of this case
7 and all references in their files to you, would that
8 alleviate your fears?
9

10 A It would help a little bit but the fact of
11 the matter is that agents of the CIA have now seen it and
12 the damage has been done. My fear would be alleviated a
13 little bit, yes.

14 Q We will make that offer to you if you want
15 all copies of your letter back if you want your name
16 stricken, there is nothing in the FBI files, if you want
17 your name stricken from the CIA files, we will be happy
18 to do that.

19 MR. NEUBORNE: On behalf of Miss MacMillen,
20 we accept that. Thank you very much.

21 I hope you will do the same for the other
22 two people in this case as well.

23 MR. WULF: I was just going to say that.

24 BY MR. ROEST:

25 Q You also stated that you were not as fearful

1
2 or as apprehensive about foreigners looking at your mail
3 because they wouldn't understand the nuances of our language?

4 A Yes.

5 Q Is your friend American?

6 A The friend in question?

7 Q Yes.

8 A Well --

9 Q He is a Soviet, right?

10 A Yes.

11 Q He speaks English?

12 A Yes. Yes, to a certain extent.

13 Q Would you believe that your friend would
14 understand the nuances of our language.

15 A I would leave that up to me. I know him.

16 Q I am not sure that the CIA people wouldn't
17 understand the nuances of our language.

18 I do have some difficulty talking to you about
19 the physical symptoms because I had difficulty examining
20 you about symptoms because I learned of them last night.
21 But you talked about a skin allergy, is that something like
22 hives?

23 A Yes.

24 Q And he --

25 A And the respiratory problem.

1
2 Q I don't know a simple word for that.

3 A The reaction --

4 Q No, that's all right.

5 I think you stated that you didn't intend to
6 publish this letter, is that correct?

7 A Definitely.

8 Q And I think you also stated that as far as
9 you know your friend received the letter in perfect condition?

10 A As far as I know, yes.

11 MR. BOESE: No further questions.

MR. NEUBORNE: No redirect, your Honor.

13 THE COURT: Thank you very much, Madam.

14 Any further witnesses for the plaintiff?

15 MR. WULF: No, your Honor, but Plaintiff
16 would like to introduce two further exhibits. One
17 of them would, I think, go in without objection,
18 Plaintiff's Exhibit 12, survey of project
19 appointed.

20 Excerpts of Book 3 of the final report of
21 Governmental agents with respect to Government
22 activities, otherwise known as the Church Report.
23 I have the entire volume of Book 3 but want to
24 introduce only Pages 561 through 567 and 604
25 through 611.

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the objection. That's cross-examination of the
Attorney-General.

THE COURT: Yes. I don't want the Attorney-
General here. I've allowed this to come in primarily,
mainly on the issue of whether it was reasonable, and
is reasonable for the Plaintiffs to continue to have
the fears they expressed on the witness stand, but
I don't want the Attorney General here, because I
don't think it can be of sufficient help to you to
warrant intefering with his duties.

MR. BOESE: Your Honor, the Government calls
Mr. Richard Kinsey -- I'm sorry, your Honor,
Mr. Robert Young.

R O B E R T Y O U N G , having been first duly
sworn by the Clerk of the Court, was examined and
testified as follows:

THE CLERK: State your full name for the
record, please.

THE WITNESS: Robert Stanley Young, Y-o-u-n-g.

DIRECT EXAMINATION

BY MR. BOESE:

Q Mr. Young, would you please state your full
name and occupation, please?

A Robert Stanley Young.

I'm an Inspector on the Inspector General's

1 staff of the Central Intelligence Agency.

2 Q How long have you held that position?

3 A Since August 1975.

4 Q And how long have you been employed with the
5 Central Intelligence Agency?

6 A Since 1951.

7 Q What was your position prior to your current
8 position?

9 A I was the Freedom of Information Coordinator
10 for the Agency, and -- meaning that I was responsible for
11 receiving their requests and tasking the searching in
12 response to requests from the public for information the
13 Agency might have about that.

14 Q We had some discussion by the Plaintiff this
15 morning as to what the Freedom of Information Act is. Just
16 to enlighten the jury, could you give a little more detail
17 about what the Freedom of Information Act is?

18 A It's an act passed by Congress that allows the
19 public to address requests to Government agencies for
20 information, to request for documents the Government may hold,
21 about almost any subject the public might be interested in,
22 including information of themselves. Since passed last year,
23 we now have the privacy act, which is specifically directed
24 toward the public to request Government agencies, if the
25 agency holds any information on them.

1
2 Q Have you ever had occasion to review CIA
3 files regarding Norman Birnbaum, B. Leonard Avery or
4 Miss Mary Rue MacMillan?

5 A Yes. In relation to this litigation.

6 Q Are you familiar with the CIA mail intercept
7 program, and if so, how did you become so aware?

8 A I'm generally familiar, because I did a
9 study in relation to litigation in another case. So, I
10 did have reason to look into the program in general terms.

11 Q I show you what has been marked as Government's
12 Exhibit 7, dated -- A memorandum for the Director of CIA
13 from Mr. Donald F. Chamberlain, Inspector General, dated
14 June 4, 1976. Could you identify that document?

15 (Handing to witness.)

16 A This is the study I just referred to that
17 was prepared.

18 Q That was done by the Inspector General?

19 A I was the author. I was assisted by several
20 other people familiar with the program.

21 Q As to Norman Birnbaum, could you describe
22 what was done with copies of his correspondence after they
23 were intercepted by the Central Intelligence Agency?

24 A Four copies were made. One was placed into
25 the mail intercept file, itself. The other three were

2 1
2 disseminated to three units within the CIA. One was the
3 Soviet Division, and two units within the Counter
4 Intelligence staff.

5 Q What is the Soviet Division?

6 A This is a division responsible for the
7 collection of information on foreign countries, foreign
8 intelligence.

9 Q And what is the Counter Intelligence
10 Division?

11 A It's the organization within CIA that's
12 responsible for countering the intelligence activities
13 on other countries directed towards the United States,
14 as, for example, infiltrating the Central Intelligence
15 Agency.

16 Q Now, could you go on to describe what
17 happened to Mr. Birnbaum's correspondence after these
18 copies were made?

19 A The only copy in existence in the agency
20 now, other than what was prepared for this litigation,
21 are the freedom of information act requests, is the
22 copy in the mail intercept file. The other copies were
23 presumably returned to the project and destroyed.

24 Q There are no other copies in CIA files at
25 this time, except for litigation purposes?

1 A No. And a thorough search has been made.

2 Q Who has access to this mail intercept
3 project file?
4

5 A Only --

6 Q Now.

7 A Only -- I don't know the exact number, but
8 I'd say only a few individuals within the Counter Intelli-
9 gence staff. The file is only used today to respond to
10 requests from the public as to whether CIA has any informa-
11 tion on it. That file was searched, along with a number
12 of other files, to determine whether the agency has any
13 information. It is not -- It hasn't been -- It doesn't
14 have any general accessibility in the agency at all. Only
15 a few individuals.

16 Q Copies of Mr. Birnbaum's correspondence was
17 sent outside of the CIA?

18 A No. They were not sent out.

19 Q Now, I will refer you to Mr. B. Leonard
20 Avery, the second plaintiff in this lawsuit. Have you
21 had occasion to search files of the Central Intelligence
22 Agency regarding Mr. Avery?

23 A Yes.

24 Q Would you describe what was done with his
25 correspondence after it was intercepted by the CIA?

1
2 A Three copies of his letter were made. One
3 was put into the letter intercept file, one was disseminated
4 to a unit within the Counter Intelligence staff, and one
5 was disseminated to the FBI.

6 Q Are there any copies of Mr. Avery's
7 correspondence within the files of the CIA today?

8 A On the copy in the project file.

9 Q So therefore, there are no copies other than
10 projects outside another branch of the CIA?

11 A Not the CIA, no.

12 Q Is there any indication when the other files
13 were either returned to the project file or destroyed?

14 A As I understand it, it was the practice to
15 hand carry these letters to named individuals, where they
16 would look at them and then reseal them, and send them back
17 to the project where they were --

18 Q And those were named individuals within the
19 CIA?

20 A Yes.

21 Q Now, I will direct you to Miss Mary Rue
22 MacMillan, the third plaintiff who testified this morning.
23 Could you describe what was done with her correspondence
24 inside the CIA after its opening?

25 A Only one copy of her letter was made, and it

2 was put into the mail intercept file.

3 Q Was there any indication of any other copies
4 in the CIA?

5 A No. The reason we know that is because in
6 the other two cases we found a dissemination record with
7 the copies of the letters in the file. In her case there
8 was no dissemination record.

9 Q Once again, who has access to that letter
10 in her file, in that project file today?

11 A Only several individuals within the Counter
12 Intelligence.

13 Q And for what purpose?

14 A To respond to requests under the freedom
15 of information and privacy acts.

16 Q If any other person wanted to get either
17 Miss MacMillan's, Mr. Avery's or Mr. Birnbaum's letter,
18 could they get that?

19 A In a case like that, say Mr. Birnbaum, we
20 would write Mr. Birnbaum to say we have a request from
21 Mr. Jones for your letter. Will you approve releasing
22 the letter to Mr. Jones? If he said no, nothing further
23 happens. If he said yes, we would send it, but only with
24 his expressed approval.

25 Q Do you know how long after Miss MacMillan's
letter was opened that the program was terminated?

1
2 A Oh, within two weeks, and I assume that's
3 one of the reasons her letter wasn't sent any where,
4 because the project was dying down, and there was no
5 further interest in dissemination.

6 Q Apart from the copies made of plaintiffs'
7 correspondence, was the information within the correspondence
8 recorded in any other CIA -- In CIA records?

9 A Only in Mr. Birnbaum's case a three page
10 memoranda was prepared on the -- It is International
11 Sociological Organization, and the contents of that
12 memoranda come almost, I believe, entirely from that letter.
13 You can construct the memoranda from the letter.

14 Q Did each letter involve a comment or summari-
15 zation by a CIA analyst?

16 A Yes. In all three cases, and in other cases
17 in this program, the analyst within the Counter Intelligence
18 staff who reviewed the letter wrote a summary of it, just
19 summarizing its contents.

20 Q What was the purpose of that?

21 A So individuals who received the letter on
22 distribution would realize it was a summary.

23 Q Many people never read the letter itself,
24 but only the summary. It's possible.

25 A It's possible.

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Q Are the names -- Is Norman Birnbaum's name on a Central Intelligence Agency watch list?

A No.

Q Is B. Leonard Avery's name on a Central Intelligence Agency watch list?

A No.

Q Is Mary Rue MacMillan now or ever been on a CIA watch list?

A No. The only records we have of these individuals is the several interceptive letters that are under litigation.

Q And where are they found?

A The letters?

Q The letters.

A In the Counter Intelligence staff mail intercept program file.

Q You found no letters outside in other parts of the CIA?

A No. There's no other place outside the Central Intelligence Agency where they would be found.

Q Mr. Young, I will show you what has been marked as Government's Exhibit 4. Could you stated what that is?

(Handing to witness.)

1
2 A It is apparently an entry from the watch
3 list that was maintained in this program, indicating there
4 was an interest in Moscow State University letters to or
5 from that institution.

6 Q And Mr. Avery's letter?

7 A Was from his son, who was going to school
8 there.

9 Q At Moscow State University?

10 A Yes.

11 Q And the return address on the letter was
12 Moscow State University?

13 A Right. That's why the letter was intercepted.
14 Not because of the investigation.

15 Q What is the practice of the CIA of releasing
16 documents of this kind upon request of the individual who
17 was concerned in the document?

18 A Any requests from the public for a letter
19 which the CIA intercepted would be returned to the requestor.

20 Q Is it difficult to obtain those records?
21 Does it take six months, or a year?

22 A No. There's an index, a name index to the
23 individuals. There have been cases when you are not sure
24 what John Jones did, you have to go back to the individual
25 to make sure he's the individual who either wrote or

1 received the letter.

2
3 Q But it's a matter of a month or two months
4 or three months before you get your letter?

5 A Yes.

6 Q Just for the record, Mr. Young, does the
7 CIA continue to open mail destined to or incoming from
8 the Soviet Union today?

9 A No. The program was stopped in mid-February
10 1973 by order of the director of the agency, not from any
11 external force. It was considered a program that should
12 be stopped.

13 Q Is there any presidential directive?

14 A Yes. Executive or the 1105, which specific-
15 ally prohibits the agency from opening mail, and I believe
16 Congress is considering legislation along those lines.

17 Q Mr. Young, a couple of points concerning
18 approximately how many people within the agency saw each
19 and every one of those letters. Do you have any idea of
20 approximately how many people within the CIA saw Mr.
21 Birnbaum's letter?

22 A Well, it was seen by the individual in New
23 York who opened it. It was seen by the analyst, who
24 summarized it. It was seen by at least three addressees,
25 presumably seen by them because it was disseminated to

2 three different points, and presumably it could have been
3 -- It was seen by -- We had no idea whether it was read
4 or not -- By a file clerk who had filed it and by a key
5 punch operator who prepared the index. What's that? 7?

6 Q We are talking about somewhere between 4, 5
7 or 7.

8 A Yes.

9 Q And as to Mr. Avery, can we estimate how
10 many people actually saw Mr. Avery's letter?

11 A Well, again, the individual in New York who
12 intercepted it, the analyst who summarized it, file clerk
13 who filed it, and the individual who it was disseminated
14 to within the agency.

15 Q What about Mary Rue MacMillan's letter. Can
16 we estimate how many people might have seen it?

17 A Three, using the same rationale.

18 Q Because there was no dissemination?

19 A Because there was no dissemination.

20 Q Mr. Young, why are copies of the plaintiffs'
21 correspondence still kept and maintained in their intercept
22 project file of the CIA?

23 A We'd love to destroy the whole file, but
24 because of litigations such as this, because of
25 Congressional prohibitions against destroying it, we have

to maintain it, and it's only used today to respond to public requests on the freedom of information, privacy act.

MR. BOESE: Thank you, Mr. Young. I have further questions, your Honor.

MR. WULF: I have some cross, your Honor.

CROSS-EXAMINATION

BY MR. WULF:

Q Mr. Young, you say the project was discontinued in 1973?

A Yes.

Q Do you remember whether the public was first informed of the fact that there was such a mail opening project?

A It came out of the Rockefeller Commission Investigation, I would think, initially.

Q When was that?

A Sir, I can't remember that.

Q If I told you --

A The allegations were made in the New York Times in December of '74, I believe. So it came out in the spring of 1975.

Q If I told you it was June '75, because it said so on the front of the document.

1
2 A Yes. But there's a lot of newspaper listing
3 prior to that.

4 Q You say the files of that are now kept
5 because of litigation that resulted from the public file
6 of the information?

7 A No. I said that, and also there's
8 Congressional prohibition on the agency against destroying
9 any files related to the Congressional investigation.

10 Q When did that Congressional investigation
11 begin?

12 A Oh, about this time, the Rockefeller
13 Commission closed down.

14 Q About 1975?

15 A Yes.

16 Q '73 and '75 there wasn't any Congressional
17 prohibition against destroying that material?

18 A No.

19 Q Why did you keep it?

20 A I have no idea why management decided to
21 keep it.

22 Q It wasn't to be responsive to a Congressional --

23 A No.

24 Q You kept it because the agency keeps every
25 piece of paper it produces?

13 1

Young-cross

2

A No. It probably is delinquent in destroying

3

the files.

4

Q It kept all these pieces of paper?

5

A Yes.

6

Q And all these people's names were in your

7

files?

8

A Right.

9

Q Let me show you plaintiff's Exhibit 8, which

10

has been in evidence, a copy of a letter from Michael

11

Avery to his father. Have you seen it?

12

(Handing to witness.)

13

MR. BOESE: Is that Plaintiff's Exhibit 8?

14

MR. WULF: 8.

15

Q Have you seen this letter?

16

A Yes.

17

Q Have you read it?

18

A I've scanned it, any way.

19

Q And you say it was opened because Michael

20

was at Moscow State University, which was on the watch

21

list?

22

A Yes.

23

Q What was of Intelligence interest to the

24

CIA in that letter?

25

A In my opinion, there is no Intelligence

interest.

1
2 Q All right. Let me show you the same exhibit.
3 There is a document on the top. Would you tell the jury
4 what that document is, please?

5 A Hunter report. That's the name, the project
6 name for sending copies of these letters to the FBI.

7 Q And what is that document on the top of
8 that exhibit?

9 A It's --

10 Q This document right there?

11 A That's the transmittal of the letter and
12 summary to the FBI.

13 Q From CIA to FBI?

14 A That's right.

15 Q So, the Avery letter did get sent over to
16 the FBI?

17 A Yes.

18 Q Why?

19 A I understand it's because they had an
20 interest in U.S. Exchange Students in Russia.

21 Q Do you know what that interest was,
22 presumably?

23 A I could only presume it was because they
24 thought that Soviet Intelligence sources might target
25 against such individuals.

14a

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Young-direct

[112a]

2

Q

Do you know what happened with this letter

3

after it went to the FBI?

4

A

I have no idea.

5

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2 Q Let me show you Plaintiff's Exhibit No. 12,
3 which has been introduced into evidence, which is entitled,
4 ten-page document headed "Survey of project pointer."
5 Have you seen that document?

6 A Yes.

7 Q Could you explain what that document is,
8 please?

9 A That was a budget matter related to use of
10 overtime in the project, and the director of security
11 apparently asked to have a review of the project prepared
12 for him.

13 Q The head of the security office in the
14 CIA?

15 A Somebody in the -- I would assume the office
16 of security prepared this document for the director of
17 security of CIA.

18 Q Do you know whether this document was
19 circulated beyond the office of the director of security
20 of CIA?

21 A I don't know. I would presume it would not.

22 Q Is the director a senior official in the
23 CIA? The director of security?

24 A Yes.

25 Q Have you read this document?

1
2 A I may have read it in my research to prepare
3 this other paper. I could not specifically remember. I
4 read a number of documents like this.

5 Q Could you read this sentence to the jury,
6 and it begins with disparity, and ending with these words
7 here.

8 MR. BOESE: Your Honor, I don't know the
9 relevance of having Mr. Young read it. The jury
10 is free to consider it in their deliberation. He's
11 merely a witness on dissemination.

12 THE COURT: I take it there's going to be
13 a question and this is a foundation, a foundational
14 question?

15 MR. WULF: This is not a foundational
16 question. It is the internal text that I want the
17 jury to hear it from the mouth of an official of
18 the CIA describing a characterization of this
19 program written by other high officials of the
20 CIA.

21 MR. BOESE: Your Honor --

22 THE COURT: Sustained.

23 MR. BOESE: Thank you.

24 Q You testified, Mr. Young, that you assumed
25 that the Avery letter was seen by four individuals within

1
2 the CIA; is that right?

3 A That's what I said.

4 Q You are not -- Well, did you say that? It
5 was only a few moments ago?

6 A If you are holding what I said, I don't
7 remember the --

8 Q The person who opened it, by the analyst
9 who first saw it, by the person whom it was disseminated,
10 and lastly, to the file clerk, I believe you said, who
11 put it away.

12 A That's pretty accurate.

13 Q Do you know for a fact, of your own knowledge,
14 that those are the only people who saw this letter?

15 A No, I don't.

16 Q Is it possible that it was disseminated to
17 more than one individual?

18 A It was not disseminated to more than one
19 individual. That individual it was disseminated to might
20 have shown it to someone else. I have no way of knowing.

21 Q You use dissemination in a more technical
22 sense than I do. Might -- As far as you know -- It has
23 been shown to six other people in Counter Intelligence
24 Division.

25 A I take it highly unlikely.

Young-cross
Kinsey-direct

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Q Possibly?

A Possibly.

Q Four people?

A Anything.

Q Two people.

No further questions.

THE COURT: All right, thank you very much.

Next witness.

MR. BOESE: The Government calls Mr. Richard

Kinsey.

R I C H A R D G A R R E T T K I N S E Y , having

first been duly sworn by a Clerk of this Court,

was examined and testified as follows:

THE CLERK: Would you please state your
full name?

THE WITNESS: Richard Garrett Kinsey,
K-I-N-S-E-Y.

DIRECT EXAMINATION

BY MR. BOESE:

Q Mr. Kinsey, would you state your full name?

A Richard Garrett Kinsey.

Q And your current occupation?

A I'm unit chief in the Intelligence Division
of the FBI Headquarters.

1
2 concerning Mr. Avery.

3 Q I show you what has been marked as plaintiff's
4 Exhibit 8. Could you identify that document?

5 (Handing to witness.)

6 A This is the document that we received from
7 CIA, a copy.

8 Q Based upon your knowledge of the program,
9 as custodian, and your analysis of that document, could
10 you describe the dissemination of that letter and that
11 document within the Federal Bureau of Investigation after
12 its receipt by the -- From the Central Intelligence
13 Agency?

14 A How we handed it?

15 Q Yes. Well, before you go on to say that,
16 were you involved in the mail opening program?

17 A No, I was not.

18 Q You took the present position when?

19 A In July '76.

20 Q Could you go to answer the question about
21 dissemination within the FBI?

22 A My knowledge of the handling of the documents,
23 based on review that I made from our policy concerning
24 such handling, CIA to FBI, in this instance the communica-
25 tion would be delivered by the clerk by the name of

1
2 Papich. It would then have been turned over to a clerical
3 analyst, Mary Triplett, who would have reviewed our
4 indices, which is similar to a library card file, to see
5 if we had any references to anyone mentioned in the letter,
6 Mr. Avery or his son. She would have then referred it to
7 Agent Cornelius Sullivan for his decision as to whether
8 the content of the letter in paraphrased form -- In other
9 words, written in such a manner that any field office
10 representative of the FBI would know the origin of the
11 document.

12 Mr. Sullivan, in this case, determined that
13 the content of the letter was not of sufficient importance
14 to disseminate it to a field office. He thereupon placed
15 his initials upon the document and referred it to what we
16 call a special file or where the document was thereafter
17 filed.

18 Q Could you tell me, based what on this
19 document, allows you to make that analysis of what happens
20 to it within the FBI?

21 A Yes. In the event any dissemination was
22 made of any mail intercept from Central Intelligence
23 Agency, it was the responsibility of the handling supervisor
24 to so note in handwriting on the face document or the
25 transmittal letter from CIA. There is no such notation on

1
2 this document. Therefore I can conclude that the document
3 never was disseminated outside of FBI Headquarters.

4 Q Could you conclude that it disseminated
5 anywhere within FBI Headquarters except for those persons
6 who dealt with it which you have just mentioned?

7 A Yes. Similarly, in handling documents
8 internally, if they are transmitted to another area of
9 FBI Headquarters a notation must be placed in the margin
10 of the document.

11 Q Just for the jury's attention, the initial
12 person, Mary Triplett, whom he referred to as clerk, is
13 right up here. Mr. Sullivan's name is in a scroll, is
14 right up there, and then you will be free to analyze the
15 rest of the document to determine whether or not there is
16 any markings on it. If you will notice, that except for
17 a couple of stamps which had been received. One stamp
18 over here, there are no other markings on it as to its
19 dissemination.

20 Mr. Kinsey, did you check the files relating
21 to Mary Rue MacMillan?

22 A Yes, I did.

23 Q Did you see anything in FBI files anywhere
24 regarding to Mary Rue MacMillan?

25 A There is no reference to Miss MacMillan,

1 with the exception of this present litigation.

2 Q So in other words, you received her name
3 because as Department of Justice Attorney you have to
4 stay in touch with the FBI if they are at all concerned
5 with the case?
6

7 A That is correct.

8 Q Other than that mentioned in FBI files, is
9 there any other reference to Mary Rue MacMillan?

10 A There is no reference to Miss MacMillan.

11 Q Do you have any objection to me taking that
12 back after I am finished, since I am committed to give
13 Miss MacMillan all her letters back?

14 A The letter?

15 Q The transmittal memo.

16 A Be my guest.

17 Q So it is your testimony then, that within
18 the FBI, Mr. Sullivan, Miss Triplett, the Clerk analyst,
19 perhaps the file clerk who filed it had access to the
20 document?

21 A That's correct.

22 Q Is there any basis for anyone else having
23 access to that document?

24 A No. Because the documents have always
25 been treated with the highest degree of security within

1
2 the FBI, because of the sensitivity of the fact that it
3 was a mail intercept. There have been, of course, over
4 the years since this letter was received by us in February
5 of 1969 --

6 Q You are talking about Mr. Avery's letter?

7 A I'm sorry, yes.

8 Q Go ahead. Finish your -- I finished my
9 question. You said since the letter was received in 1969?

10 A That's when Mr. Avery's letter was received.

11 Q Thank you.

12 Mr. Kinsey, of what use have these documents
13 been put to by the FBI today?

14 A Today they may only be used in response to
15 Freedom of Information, Privacy Act Requests, and we do
16 review them in the event of an application for FBI employ-
17 ment, but only for FBI employment.

18 Q So then, unless Mr. Avery applies for FBI
19 employment or he, himself, files a Freedom of Information
20 Request to the FBI, his file will not be looked at?

21 A That's right.

22 MR. BOESE: I have no further questions,
23 your Honor.

24 CROSS-EXAMINATION

25 BY MR. WULF:

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Q Mr. Kinsey, is the FBI in the habit of seeking a 59 year old advertising man in employment?

A No. they are too old.

Q Where are you keeping Mr. Avery's letter on file?

A It has been our policy over the years not to destroy any communication or document that we receive.

Q Makes the FBI a vacuum cleaner?

A If that's your words.

Q Would you give me back Mr. Avery's letter?

A I have to get authority from a higher level.

Q I hope you try.

Why are those files treated so sensitively, Mr. Kinsey?

A Because they were interception of mail.

Q Illegal interceptions of mail, in your opinion?

A This was an extremely sensitive program. CIA asked us to treat them with, and we did so.

Q Did you know that mail was being opened without warrant, without probable cause?

A I was unaware at the time that the letters were being opened that that was a fact.

Q Do you now know it to be a fact?

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A Yes.

Q And you now know the truth of illegal searches --

MR. BOESE: The question of legality is to be determined by the Court, and not by Mr. Wulf.

THE COURT: Sustained.

Q Do you have any -- Did you read the Avery letter, yourself?

A Yes, sir.

Q In anticipation of this litigation perhaps?

A Yes, sir.

Q Did you have any reason to disagree with Mr. Sullivan's judgment that it was of no special interest to the FBI?

A He made the right decision.

MR. WULF: Thank you.

THE COURT: Thank you very much.

MR. BOESE: Your Honor, we have no further witness. We only have one more piece of evidence, what has been marked as Government's Exhibit 6. It is a stipulation entered into between Mr. Neuborne, counsel for the plaintiff and myself.

THE COURT: It's been marked already.

MR. NEUBORNE: It's been marked.

1
2 MR. BOESE: And the jury will be free to
3 examine it?

4 THE COURT: Yes. You are free to discuss
5 it.

6 MR. BOESE: Your Honor, that's the close
7 of the Government's case.

8 THE COURT: All right. You may reserve
9 motions. All right, ladies and gentlemen, you have
10 heard all of the evidence. Now we will hear
11 arguments. Those are very important to you. Listen
12 carefully. It is not evidence, however.

13 You may proceed, gentlemen.

14 (Continued on next page.)
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is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. The claimant shall deliver two copies of the claim to the Clerk to enable the Clerk to mail one copy to the Administrator.

All persons interested in the estate are required, WITHIN THIRTY DAYS FROM THE DATE OF THE FIRST PUBLICATION OF THIS NOTICE to file any objections they may have that challenge the qualifications of the Administrator, or the venue or jurisdiction of the Court.

ALL CLAIMS, DEMANDS, AND OBJECTIONS NOT SO FILED WILL BE FOREVER BARRED.

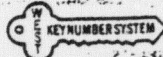
Date of the first publication of this Notice of Administration:

Frederick R. Short, Jr.

As Administrator of the

Estate of Ahmad Jama,

Deceased Seaman



Norman BIRNBAUM, Plaintiff,

v.
UNITED STATES of America et
al., Defendants.

B. Leonard AVERY, Plaintiff,

v.
UNITED STATES of America et
al., Defendants.

Mary Rule MacMILLEN, Plaintiff,

v.
UNITED STATES of America,
Defendant.

Civ. A. Nos. 76-1837, 77-C-234, 77-C-597.

United States District Court,
E. D. New York.

Aug. 17, 1977.

Plaintiffs, individually and as a class,
brought action against United States to re-

cover damages under Federal Tort Claims Act as result of action of Central Intelligence Agency in intercepting, opening and copying certain first-class mail which was sent or received by plaintiffs. The District Court, Weinstein, J., held that: (1) action of CIA in opening, reading and copying first-class mail without warrant and without probable cause for warrantless search was illegal under First and Fourth Amendments as well as applicable federal statutes; (2) Federal Tort Claims Act exceptions for discretionary acts, claims arising out of mis-carriage of letters, and certain specified intentional torts were not applicable to plaintiffs' claims; (3) New York would recognize common-law right of privacy sufficiently to compensate plaintiffs for CIA's action; (4) doctrine of common-law copy-right protected plaintiffs; (5) violation of plaintiffs' constitutional rights was ground of liability under New York law; (6) plaintiffs' suit was not certifiable as class action, and (7) plaintiffs were each entitled to award of \$1,000 provided that Government furnished each plaintiff with suitable letter of regret and assurance of nonrecurrence; 25% of such award would be paid to plaintiffs' counsel as attorney fees.

Order accordingly.

1. Constitutional Law — 82

Post Office — 43

Searches and Seizures — 7(10)

Action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search was illegal under First and Fourth Amendments as well as applicable federal statutes. 18 U.S.C.A. §§ 241, 371, 1702; U.S.C.A. Const. Amenda. 1, 4.

2. United States — 78(12)

There is no discretion under our system to conceive, plan and execute an illegal program; federal official cannot have discretion to behave unconstitutionally.

3. United States — 78(12)

Federal Tort Claims Act exception for discretionary acts did not defeat district

court's jurisdiction over plaintiffs' claims against the United States arising out of illegal action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search. 28 U.S.C.A. §§ 1346(b), 2680, 2680(a).

4. United States ⇐ 78(5)

Federal Tort Claims Act exception for claims arising out of "loss, miscarriage, or negligent transmission of letters" had no application to plaintiffs' claims against United States arising out of illegal action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search. 28 U.S.C.A. §§ 1346(b), 2680(b).

5. United States ⇐ 78(5)

Invasion of privacy, common-law or constitutional, is not mentioned in provision of Federal Tort Claims Act exempting Government from suit for specified intentional torts, and for that reason is not excluded. 28 U.S.C.A. § 2680(h).

6. United States ⇐ 78(5)

Parties may sue under Federal Tort Claims Act for intentional wrong. 28 U.S.C.A. §§ 1346(b), 2680(h).

7. United States ⇐ 78(5)

Provision of Federal Tort Claims Act exempting Government from suit for specified intentional torts did not bar plaintiffs' claims against United States arising out of illegal action of Central Intelligence Agency in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search, in view of fact that suits for invasions of constitutional right of privacy were not mentioned in list of intentional torts contained in such provision. 28 U.S.C.A. § 2680(h).

8. United States ⇐ 78(3)

Congressional policy underlying Federal Tort Claims Act is to hold the United States liable under state law principles to the same extent as similarly situated private individuals. 28 U.S.C.A. § 1346(b).

9. United States ⇐ 78(14)

Trial court hearing action brought under Federal Tort Claims Act must look to whole law of state where tort occurred, including that state's law of conflicts. 28 U.S.C.A. § 1346(b).

10. Torts ⇐ 8.5(1)

In context of actionable torts, the general rubric "right of privacy" encompasses four concepts: (1) intrusion upon seclusion of another; (2) appropriation of other's name or likeness; (3) publicity given to other's private life of a sort which is offensive and not of legitimate public concern; and (4) publicity which places other in a false light before public.

11. Torts ⇐ 8.5(4)

Tort of invasion of privacy is committed whenever intrusive act is committed, even if tort-feasor never reveals either the fact of invasion or any information about plaintiff to third persons.

12. Torts ⇐ 8.5(4)

Common-law right of privacy extends beyond plaintiff's immediate physical environment and is infringed by examinations of bank accounts or of personal records under false pretenses, or by opening of mail.

13. Federal Courts ⇐ 384

Federal court, determining law of the state, cannot blindly follow outmoded case law, but must make reasoned attempt to determine how state courts would now decide the issue before it.

14. Torts ⇐ 8.5(4)

Evidence of recent statutory enactments in New York, as well as developments in case law, established that New York would recognize common-law right of privacy sufficiently to compensate plaintiffs for Central Intelligence Agency's action in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search.

15. Literary Property ⇐ 4

Common-law copyright reserves to authors the right to control time and circum-

stances of first publication of their work; the doctrine has been utilized to shield writers of ordinary, nonliterary letters against misappropriation and nonconsensual publication of their correspondence.

16. Literary Property — 3

Doctrine of common-law copyright, as accepted in New York, protected plaintiffs who wrote letters which were opened by Central Intelligence Agency, read, copied, and incorporated into files of CIA without warrant and without probable cause for warrantless search.

17. Literary Property — 3

Doctrine of common-law copyright, as accepted in New York, protected plaintiff who was recipient of a letter which was opened by Central Intelligence Agency, read, copied, and incorporated into files of CIA, without warrant and without probable cause for warrantless search.

18. Literary Property — 3

Under doctrine of common-law copyrights, recipient of personal letter has definite property interest in the writing which is also protectible by courts.

19. Torts — 6

Under New York law, tortious conduct by government agents in violation of constitution is ground for recovery of damages.

20. Constitutional Law — 90.1(1)

Searches and Seizures — 7(10)

Freedom of speech and right to be free from unreasonable searches and seizures extends not merely to person and immediate surroundings of individuals, but to their correspondence as well. U.S.C.A. Const. Amends. 1, 4.

21. Damages — 59

In assessing damages for tortious conduct in violation of constitutional rights, fact that it is a government official who violates Constitution is an aggravating, not a mitigating, factor.

22. Torts — 5

Under New York law, plaintiffs who were personally harmed by Central Intelli-

gence Agency's action in opening, reading and copying first-class mail without a warrant and without probable cause for warrantless search were entitled to damages.

23. Federal Civil Procedure — 161

In order to certify suit as a class action, court must find that class action is superior to other means for a fair and efficient adjudication of controversy. Fed. Rules Civ. Proc. rule 23(b)(3), 28 U.S.C.A.

24. Federal Civil Procedure — 181

Suit brought to recover damages under Federal Tort Claims Act as result of Central Intelligence Agency's action in intercepting, opening and copying certain first-class mail sent or received by plaintiffs was not certifiable as class action, in view of fact that injured parties could not be easily identified, little practical advantage would accrue to individual members of class, since facts upon which liability rested were undisputed, and class action would present inordinate management problems, since amount of injury could vary widely from individual to individual. Fed. Rules Civ. Proc. rule 23(b)(3), 28 U.S.C.A.

25. United States — 142

Recovery under Federal Tort Claims Act is limited to compensatory damages. 28 U.S.C.A. §§ 1346(b), 2674.

26. United States — 142

Award of damages under Federal Tort Claims Act may not take into account injuries inflicted upon structure of American democracy. 28 U.S.C.A. §§ 1346(b), 2674.

27. Damages — 5

Where person suffers invasion of right to privacy, awards are appropriate for general damages covering injury of invasion itself, as well as for resulting mental distress; lack of objective harm is no bar to recovery.

28. Damages — 49

Mental distress is element of damages in civil suits for constitutional violations.

29. Literary Property — 9

Searches and Seizures — 8

Torts — 8.5(4)

Plaintiffs whose mail was intercepted by Central Intelligence Agency, read and copied, without a warrant and without probable cause for warrantless search, were entitled to recover damages under any of three tort theories of violation of common-law right to privacy, violation of common-law copyright, and tortious conduct violating constitutional rights.

30. United States — 142

In suit brought under Federal Tort Claims Act, verdict of advisory panel is only part of data taken into consideration in arriving at court's independent conclusion as to damages. 28 U.S.C.A. §§ 1346(b), 2402.

31. Damages — 130(1)

United States — 147

Plaintiffs whose mail was intercepted by Central Intelligence Agency, read and copied, without a warrant and without probable cause for warrantless search, who suffered mental distress as result of such interference with their civil liberties, but who suffered no objective, observable injury, were each entitled to award of \$1,000 provided that Government furnished each plaintiff with suitable letter of regret and assurance of nonrecurrence; 25% of such award would be paid to plaintiffs' counsel as attorney fees. 28 U.S.C.A. §§ 1346(b), 2412, 2678.

Rabinowitz, Boudin & Standard, New York City, for plaintiff Birnbaum; Herbert Jordan, K. Randlett Walster, New York City, of counsel.

Melvin L. Wulf, Burt Neuborne, New York City, for plaintiffs Avery and MacMillen.

Barbara Allen Babcock, Asst. Atty. Gen., Washington, D. C., David G. Trager, U. S. Atty., Edward S. Rudofsky, Rodger C. Field, Asst. U. S. Attys., Brooklyn, N. Y., Dennis G. Linder, John T. Boese, Alphonse M. Alfano, Lawrence J. Jensen, Attys.,

Dept. of Justice, Washington, D. C., for defendants.

WEINSTEIN, District Judge.

In each of these three cases consolidated for trial the plaintiff complains that first-class mail was intercepted by the Central Intelligence Agency (CIA), opened without warrant and copied. Birnbaum and MacMillen each sent a letter abroad; Avery received one here. All the letters were resealed after copying and promptly returned to the mails. Plaintiffs, individually and as a class, seek to recover damages under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (the Act).

As explained in detail below:

(1) The court has jurisdiction to entertain these suits.

(2) A class action is not appropriate.

(3) The CIA acted tortiously under New York law in violating the plaintiffs' rights, both common law and constitutional, to privacy in their personal papers and correspondence.

(4) The court had the power to empanel an advisory jury and to rely upon its expression of community consensus that individual rights of privacy are valuable in this nation; that people do suffer psychic damage when United States agents fail to obey the law and violate individual rights; and that plaintiffs should be awarded substantial money damages.

(5) A letter from the government to each plaintiff expressing regret for the violation of his or her rights and indicating that steps will be taken to prevent a recurrence will ameliorate the harm by helping to restore plaintiffs' faith in their government.

(6) Recovery is granted to each individual plaintiff in the amount of \$1,000 plus costs.

(7) In this country we do not pay lip service to the value of human rights and individual dignity—we mean to live by our ideals. A primary role of the courts is to translate these noble sentiments into palpable reality.

I. FACTUAL BACKGROUND

From approximately 1953 until 1973, in violation of federal statutes and the Fourth Amendment of the United States Constitution, the Central Intelligence Agency conducted an extensive program of opening first-class mail passing in and out of the country through Hong Kong, San Francisco, New Orleans, and New York.

Most of the correspondence opened, photographed and circulated within the CIA and the Federal Bureau of Investigation (FBI) was intercepted by the New York project, known within the CIA by either of the two code names HTLINGUAL or SRPOINTER. Various criteria were employed in selecting letters for inspection. Sometimes the name of either the intended recipient or sender appeared on a "watch list" of "suspect" persons and institutions compiled by CIA and FBI agents. In other instances envelopes were opened because of the country of origin or destination; any letter to or from the Soviet Union, for example, was subject to inspection. In still other situations mail was examined at random. When HTLINGUAL was at its peak, New York agents investigated some 13,000 letters a year; over the life of the project, at least 215,000 pieces of mail were copied. See generally Commission on CIA Activities Within the United States, The CIA's Mail Intercepts, in Report to the President 101-15 (1975); Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Domestic CIA and FBI Mail Opening Programs, in III Final Report: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Sen.Rep. No. 94-755, 94th Cong., 2d Sess. 559-677 (1976).

Ultimately, the CIA collected and placed in computers a list of some 1.5 million names gleaned from its various mail-opening projects. Among those whose mail was read and photographed were author John Steinbeck and Senator Frank Church. Schwarz, Intelligence Activities and the Rights of Americans, 32 The Record of the Association of the Bar of the City of New York 43, 48 (1977). These operations were

only part of a general pattern of post-World War II lawlessness and abuse of power exemplifying "contempt for the law and the Constitution" by government. Schwarz at 46. Breaking this pernicious pattern and preventing its recurrence is the task of Congress and the President. The limited question before this court is whether and how reparations can be made to individuals who were personally affected by this partial breakdown in official respect for individual liberties.

Plaintiff Norman Birnbaum is a professor of sociology at Amherst College in Massachusetts. In 1970, he wrote letters to two academic colleagues—one in Canada, and the other in Rumania—about an upcoming meeting of specialists in the sociology of religion. He sent copies of those letters to a third colleague at Moscow State University. HTLINGUAL agents copied the contents of this third letter while it was in transit through the foreign mail depot at Kennedy International Airport, and later distributed four copies to various units of the CIA. According to testimony by a member of the staff of the Inspector General of the CIA, this was done solely because intelligence agencies had an "interest" in correspondence to and from Moscow University.

Plaintiff Mary Rule MacMillen wrote a personal letter in 1973 to a Soviet dissident she had met on a trip to Russia. Her letter was intercepted at Kennedy, opened and photographed, and a copy filed by the agency. But, apparently because project HTLINGUAL was terminated two weeks later, no other reproductions were disseminated.

In the final case, that of B. Leonard Avery, a letter was written to him by his son, who was then an exchange student studying at Moscow State University. Ironically, Avery, concerned that his own letters to his son might be tampered with by Soviet authorities, attempted to avoid that possibility by sending them to the American Embassy in Vienna, where they were passed on to Moscow via diplomatic pouch. His son's replies, however, arrived

by regular mail, and one of them, personal in nature, was opened here in 1968. Three copies of that letter were made, and one of these was sent to the FBI, which was described by a government witness as having "an interest in U.S. exchange students in Russia."

None of the plaintiffs were aware that their mail had been interfered with until the government responded to general requests made under the Freedom of Information Act, 5 U.S.C. § 552. They were then notified that CIA files contained copies of the letters at issue.

[1] These facts are not in dispute. The government concedes that the plaintiffs' mail was opened, read and copied. It does not contend that the actions were lawful. No judicial warrants were obtained, and no evidence was submitted to suggest the existence of probable cause for a warrantless search. Both the First and Fourth Amendments of the Constitution as well as applicable statutes and regulations support the conclusion that the opening and reading of these letters under these circumstances was illegal. *United States v. Ramsey*, — U.S. —, 97 S.Ct. 1972, 1982, 52 L.Ed.2d 617, 631 (1977) ("Applicable postal regulations flatly prohibit, under all circumstances, the reading of correspondence absent a search warrant"); *Procurier v. Martinez*, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974); *Cf. United States v. Van Leeuwen*, 397 U.S. 249, 251, 90 S.Ct. 1029, 1031, 25 L.Ed.2d 232 (1970).

In addition, HTLINGUAL and other mail-opening projects probably violated several criminal statutes. Included are 18 U.S.C. § 1702 (prohibiting the unauthorized opening or obstruction of mail within postal channels), 18 U.S.C. § 241 (prohibiting conspiracies to deprive citizens of their constitutional rights), and 18 U.S.C. § 371 (the general conspiracy statute). See generally Department of Justice, Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail

Opening Activities in the United States (1977).

The criminal liability—or lack of it—of government agents for the acts complained of is not an issue in this case. Plaintiffs seek a civil remedy: damages for injury suffered as a result of the operation of HTLINGUAL. They seek relief, not against the particular agents who opened their mail or who directed the program, but against the government, relying on the provisions of the Federal Tort Claims Act.

Because the agents were acting within the scope of their employment in carrying out the mail project, *Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977), only two substantial questions must be answered. First, has the government consented to such suits under the provisions of the Act? Second, under the relevant state law—that of New York—was the behavior of the government agents tortious and, therefore, compensable?

II. JURISDICTION

A. Not Defeated By Exception To The Federal Tort Claims Act

The United States has given its consent to be sued for torts in the District Courts whenever the government, if a private person, would be liable under the law of the place where the wrong was done. The Federal Tort Claims Act provides in part:

[T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). This general consent to suit for tortious acts of government officials and employees is qualified by a number of exceptions. 28 U.S.C. § 2680. The government argues that three exceptions—for discretionary acts, for postal matter, and for intentional torts—apply.

1. Discretionary Function Exception Does Not Apply.

Under section 2680(a) of title 28 of the United States Code the government is not liable in tort for the performance or failure to perform a discretionary act:

§ 2680. Exceptions

The provisions of this [Act] shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Any attempt to define "discretionary" in this context presents difficulties. The government relies primarily on *Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S.Ct. 956, 968, 97 L.Ed. 1427 (1953), holding that discretionary acts include not only "the initiation of programs and activities", 346 U.S. at 35, 73 S.Ct. at 968, but also

determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. (Footnotes omitted.) While this language seems broad enough to encompass the acts complained of here, the underlying facts of the case suggest the contrary. *Dalehite* concerned explosions aboard ships loaded with ammonium nitrate fertilizer.

Following World War II, the United States had sponsored the production of the highly explosive chemical product by American manufacturers in part to help alleviate acute food shortages in the occupied nations of Germany, Korea and Japan. While the wisdom of producing so dangerous a form of fertilizer was questionable, the thrust of the suit was against the judgment of government officials in approving the program. No negligence or illegality in carrying it out was averred.

Dalehite was followed in *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972), a suit to recover for damage caused by sonic booms resulting from high-altitude military training flights. There, too, the government, as a matter of policy, had decided to engage in a hazardous, but legal, activity. The Court quoted, in its decision, that portion of the House Judiciary Committee report emphasizing that the purpose of the discretionary acts exemption in the Tort Claims Act was to exclude suits for damages growing out of a legally authorized activity, such as a flood-control or irrigation project, where no wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious.

406 U.S. at 801, 92 S.Ct. at 1902 (emphasis added).

The decision to conduct an intelligence operation by methods which violate the Constitution of the United States and which also probably violate several federal statutes is not discretionary in the same sense that the decision to fly a supersonic plane over land or to produce potentially explosive fertilizer might be. There is no evidence that Congress intended this exception to do more than free the operations of government from excessive concern over the untoward, and often unexpected, results of legitimate activity conducted in the public interest.

[2,3] There is no discretion under our system to conceive, plan and execute an

illegal program. See *Hatahley v. United States*, 351 U.S. 173, 191, 76 S.Ct. 745, 100 L.Ed. 1065 (1956); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977). As the Second Circuit succinctly put the matter: "a federal official cannot have discretion to behave unconstitutionally." *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d at 1261. In this circuit, following *Myers* and *Avery*, the discretionary defense must be rejected. Cases from other circuits to the contrary are not persuasive. See *Murphy v. United States*, 76-C-12 (N.D. Iowa May 28, 1976) (dictum); *Hardy v. United States*, 76-C-1427 (D.C.D.C. Feb. 14, 1977) (relies on *Murphy*); *Siebel v. United States*, 76-C-1737 (N.D.Cal. Dec. 17, 1976) (relies on *Dalehite*).

2. Postal Matter Exception Does Not Apply.

[4] The United States also argues that these suits for damages against the government are barred by the postal matter exception to the Federal Tort Claims Act because the opening of the letters represents a mere "miscarriage" of the mail. 28 U.S.C. § 2680(b). This portion of the statute maintains sovereign immunity with regard to:

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

None of the available sources for the interpretation of this subsection support such a restrictive reading. Rather, Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year. The kind of problem that was anticipated under the heading of "loss, miscarriage or negligent transmission" was suggested by a representative of the Department of Justice during hearings on the Act:

Every person who sends a piece of postal matter can protect himself by registering

it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay, the Government could be sued for damages. Consequently, this provision was inserted.

Hearings before Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 38 (1940) (testimony of A. Holtzoff, Special Assistant to Attorney General of the United States.) Neither registration nor insurance of the letters in question in these cases would have protected the correspondents from the risk that CIA agents would procure, open and copy their mail. See also, Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 545-46 (1947); II L. Jayson, *Handling Federal Tort Claims* § 255 at 13-2-13-3 (1975).

The postal exception has no application in cases such as those before us. *Cruikshank v. United States*, 76-C-362, 431 F.Supp. 1355 (D.Haw. May 9, 1977); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977).

3. The Intentional Tort Exception Does Not Apply.

The final statutory defense of the United States is based on subdivision (h) of 28 U.S.C. § 2680. This provision, exempting the federal government from suits for specified intentional torts, reads as follows:

The provisions of [the Act] shall not apply to—

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided, That*, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the

United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Prior to 1976, when the subsection was revised, it merely provided that no suit could be brought for:

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C.A. § 2680 (1965). Congress amended the exception to broaden its consent to suit following some particularly egregious violations of the Fourth Amendment by federal narcotics agents who engaged in a series of illegal "no-knock" raids on private homes. One such raid generated a civil suit in which the Supreme Court—barred by section 2680(h), as it was then written, from holding the government itself liable—granted plaintiff the right to recover damages from the individual agents. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Congress altered section 2680(h) so that, from the date of amendment forward, such Fourth Amendment violations would be actionable against the government, providing aggrieved persons actual relief, rather than worthless awards against "judgment-proof" individual agents. S.Rep. No. 83-588, 93d Cong., 2d Sess., 2-3, reprinted in [1974] U.S.Code & Cong.Ad. News 2789, 2790-91.

The government argues that, based on this history of subsection (h), a court cannot assume that any case arising from a Fourth Amendment violation was intended, prior to 1974, to be included in the Act. The government's position apparently is that the list of exempted torts in subsection (h) was and is not exclusive, and that additional exclusions must be implied, where necessary, to protect the government against liability for types of torts Congress may not have contemplated when it drafted the law. Invasion of the constitutional right to privacy is one such unanticipated intentional

tort, runs the argument, and should be excluded—at least if it occurred before 1974.

[5] Implied exceptions, derived in this wholesale fashion, subvert the structure of the statute itself. Congress, in writing the Act, chose to enumerate very specific exemptions. No vague terms or general words are used. This problem was treated in *Ira S. Bushey & Sons, Inc. v. United States*, 276 F.Supp. 518 (E.D.N.Y.1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). The court concluded that:

The detailed listing and the absence of general terms suggests that only the torts mentioned are to be excluded.

276 F.Supp. at 526. Invasion of privacy, common law or constitutional, is not mentioned in the list either before or after 1974, and for that reason is not excluded. See *Avery v. United States*, 434 F.Supp. 937 (D.Conn., 1977) (same conclusion with respect to the HTLINGUAL program); *contra*, *Murphy v. Central Intelligence Agency*, 76-C-12 (N.D.Iowa, May 23, 1976) (dictum). As the court in *Cruikshank v. United States*, 76-C-362, 431 F.Supp. 1355 (D.Haw., May 9, 1977), put it when faced with a case similar to those of *Birnbaum*, *Avery* and *MacMillen*:

[W]e are dealing with the commission of a series of illegal acts by agents of the Government. Justice would certainly not countenance a court straining the language of a statute in order to deny the victim of such illegality at least some measure of compensation.

431 F.Supp. at 1361.

In at least one unrelated case, *Black v. United States*, 389 F.Supp. 529 (D.C.D.C. 1975), a plaintiff did recover for an invasion of common law and constitutional rights of privacy, through illegal electronic surveillance, which occurred in 1963, eleven years before the subsection was revised to take *Bivens* and similar cases into account. The court never suggested that an implied exclusion of such claims might exist. It noted that its judgment rested "on theories of trespass, invasion of privacy by intrusion, invasion of privacy by publication, and vio-

lation of Constitutional rights", characterized by the court as "intentional torts." 389 F.Supp. at 531.

[6, 7] The straightforward reading of the statute in *Black* is consistent with the general treatment of intentional torts by federal courts in suits against the government. The principle is well-established that parties may sue under the Act for intentional wrongs. The Supreme Court in *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972), for example, stated that:

The legislative history [of the Federal Tort Claims Act] indicates that Congress intended to permit liability essentially based on the *intentionally wrongful* conduct of Government employees

406 U.S. at 801, 92 S.Ct. at 1901 (emphasis added). See also, e.g., *Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956) (trespass and conversion); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975) (denial of due process and interference with business opportunity through blacklisting); *Aleutco Corp. v. United States*, 244 F.2d 674 (2d Cir. 1957) (conversion); *Ira S. Bushey & Sons, Inc. v. United States*, 276 F.Supp. 518 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968) (trespass); *Palomo v. United States*, 188 F.Supp. 633, 637 (D.Guam 1960) (waste); *United States v. Elm Chemical Corp.*, 161 F.Supp. 239, 246-47 (S.D.N.Y. 1958) (conversion by duress). The government's suggestion that suits for invasions of constitutional rights of privacy are exempt by implication must be rejected.

B. LIABILITY UNDER NEW YORK TORT LAW

[8] Section 1346(b) of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) provides that the United States may be sued for money damages caused by the wrongful act of any employee of the Government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act occurred." The

"congressional policy underlying the Act is to hold the United States liable under state law principles to the same extent as a similarly situated private individual." *Stencel Aero Engineering Corp. v. United States*, — U.S. —, 97 S.Ct. 2054, 2057, 52 L.Ed.2d 665, 669 (1977).

[9] Since the opening of mail complained of in these cases occurred at the international mail facility at John F. Kennedy International Airport in New York, the "law of the place where the act or omission occurred" is that of New York. Under the Supreme Court's interpretation of this language, a trial court hearing a federal tort action must look to the whole law of the state where the tort occurred, including that state's law of conflicts. *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Ordinarily, therefore, the court would first need to decide whether a New York court would apply its own law since the letters were neither mailed from or to a New York address. This issue need not be decided because the parties have stipulated that the substantive tort law of New York is applicable.

1. Common Law Right To Privacy.

Most states recognize invasions of privacy as actionable torts. W. Prosser, *Law of Torts* § 117 at 804 (4th ed. 1971); 1 F. V. Harper & F. James, *The Law of Torts* § 9.6 at 682 (1956).

[10] In this context, the general rubric "right of privacy" encompasses four concepts. As described by the Restatement (Second) of Torts, they are:

- (a) Intrusion upon the seclusion of another, or
- (b) Appropriation of the other's name or likeness, or
- (c) Publicity given to the other's private life [of a sort which is offensive and not of legitimate public concern], or
- (d) Publicity which places the other in a false light before the public.

3 Restatement (Second) of Torts, § 625A (1977).

[11, 12] Intrusion upon the seclusion of these plaintiffs is the branch of privacy involved in these cases. Comments to the Restatement make it plain that the tort is committed whenever an intrusive act is committed, even if the tortfeasor never reveals either the fact of the invasion or any information about the plaintiff to third persons.

The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded, or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

3 Restatement (Second) of Torts, § 652B, Comment a at 378 (1977) (emphasis added). This common law right extends beyond the plaintiff's immediate physical environment and is infringed by examinations of bank accounts or of personal records under false pretenses, or by opening of mail.

The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as where the defendant forces his way into the plaintiff's room in a hotel, or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars, or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

3 Restatement (Second) of Torts, § 652B, Comment b at 378-79 (1977) (emphasis added). The comment emphasizes that "The

intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the information." *Id.* at 379. It is apparent, therefore, that, in the majority of states, case law would provide a right to recovery on the facts of these cases.

The law of New York is less clear. This state was the first to consider a case sounding in common law privacy following the publication of a leading article on the subject by Samuel Warren and Louis Brandeis, *Warren & Brandeis, The Right To Privacy*, 4 Harv.L.Rev. 193 (1890), and its lower courts quickly recognized the doctrine. W. Prosser, *Law of Torts* § 117 n. 10 at 803 (4th ed. 1971). The New York Court of Appeals at the turn of the century was, however, not yet prepared to accept the doctrine. In *Roberson v. Rochester Folding-Box Company*, 171 N.Y. 538, 64 N.E. 442 (1902)—a case of commercial appropriation where defendant used the photograph of a woman in its advertisements without her permission—the Court by a four to three decision rejected the right to privacy as a distinct and independent tort. It stated that "The so-called right of privacy has not as yet found an abiding place in our jurisprudence". 171 N.Y. at 556, 64 N.E. at 447. The court was careful to note, however, that it was speaking of the developments up to that point—"the doctrine cannot now be incorporated" (*id.*) (emphasis supplied)—and not predicting future development. *Roberson's* refusal to recognize commercial appropriations of names, faces and the like as torts was legislatively overruled by sections 50 and 51 of New York's Civil Rights Law, but the general right to privacy has not yet been recognized explicitly by the New York Court of Appeals. Were the question to be placed once more squarely before the Court of Appeals, strong evidence suggests that the court would follow the American "tide" in favor of recognition." W. L. Prosser, *The Law of Torts* § at 804 (4th ed. 1971).

Lower courts in the state have generally continued to acknowledge *Roberson* while

finding ways to avoid it and grant recovery.

See, e. g., *Association for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee*, 37 Misc.2d 599, 236 N.Y.S.2d 216 (Sup.Ct.1962) (avoiding *Roberson* by applying law of privacy of sister states where some events occurred); *Blair v. Union Free School District No. 6, Hauppauge, Suffolk County*, 67 Misc.2d 248, 324 N.Y.S.2d 222 (Dist.Ct.1971) (avoiding *Roberson* by finding "outrageous" breach of confidence); *Galella v. Onassis*, 487 F.2d 986, 995 n. 12 (2d Cir. 1973) (collecting cases). Addressing the question of the right to privacy in New York, the Second Circuit in *Galella* noted:

[I]f we were required to reach the question, we would be inclined to agree that when again faced with the issue the Court of Appeals may well modify or distinguish its 1902 holding [in *Roberson*].

There is substantive support today for the proposition that privacy is a "basic right" entitled to legal protection. Privacy essential to individual dignity, and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights.

Id. (extensive citations omitted).

Numerous statutory enactments in New York support the Second Circuit's view. The provisions which overruled the specific holding of *Roberson* and prohibited commercial appropriations of name or identity have already been mentioned. Article 250 of the New York Penal Law, entitled "Offenses Against The Right To Privacy", includes among the listed crimes illegitimate eavesdropping, wiretapping, unlawful obtaining of communications from telegraph or telephone companies, and—most significantly from the viewpoint of the instant cases—tampering with letters or other "sealed private communication." New York Penal Law § 250.25 illustrates the strength of New York's policy against interference with private communications. It provides in part:

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or

2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof.

Tampering with private communications is a class B misdemeanor.

[13] A federal court, determining the law of the state, cannot blindly follow outmoded case law, but must make a reasonable attempt to determine how the state courts would now decide the issue before it. "Law does change with times and circumstances."

[L]aw is not restricted to what is found in Law Reports. . . . *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 209-10, 76 S.Ct. 273, 279-100 L.Ed. 199 (1956) (Frankfurter, J., dissenting).

[14] The evidence is overwhelming that New York would recognize the common law right of privacy sufficiently to compensate for the kind of intrusion by the government into private mails represented by the instant case.

2. Common Law Copyright and Property Interest in Private Papers.

The New York courts, so far as we have been able to determine, have not had a case directly on point. Nevertheless, the facts before us fit comfortably within the New York common law copyright framework. To understand why this is so, it is necessary to describe at some length the history of legal developments in this esoteric field.

[15] Common law copyright reserves to authors the right to control the time and circumstances of the first publication of their works. The right has been important

to artists, professional writers, scholars and others whose intellectual productions have some commercial value. But the doctrine also has been utilized to shield writers of ordinary, nonliterary letters against the misappropriation and nonconsensual publication of their correspondence. See Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198-206 (1890); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum.L.Rev. 1205, 1293 n. 416 (1976). In drafting the Copyright Act of 1976, Pub. L.No.94-553, 90 Stat. 2541, Congress explicitly recognized that common law copyright was relied upon by the states to protect a broad range of interests beyond those of the individual in the marketplace value of his work product. Federal law did not preempt state law in those other areas, but acknowledged its continued vitality and capacity for growth. As a relevant congressional report indicated:

The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected [by the codification of common law copyright] as long as the causes of action contain elements, such as invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement.

H.R.Rep.No.94-1476, 94th Cong., 1st Sess., 132, reprinted in [1976] U.S.Code Cong. & Ad.News, pp. 5659, 5748.

No one is quite sure when or where the concept of copyright originated. That some legally recognized right to control the publication of books and to protect them from piracy pre-dated the invention of the printing press is suggested by rumors of an Irish case decided in 567 A.D. R. Bowker, *Copyright, Its History and Its Law* 9 (1912); A. Birrell, *The Law and History of Copyright in Books* 42 (1899).

When the printing press appeared, the economic interests of book publishers coincided with the political needs of the crown; the Stationers' Company, chartered by Mary Tudor in 1557, assured both that pub-

lishers would have the exclusive right to produce and sell the works they published, and that the Crown could censor them. R. Bowker, *Copyright, Its History and Its Law* 15 (1912). The first statute specifically addressing copyright was not passed, however, until 1709 during the reign of Anne, and it, too, was designed to control the processes of publishing and bookselling rather than to protect authors' rights in unpublished works.

Common law protection of authors who had not published seems to have sprung full grown from the English courts in 1741 to close the gap left by the narrow focus of the copyright statute. In *Pope v. Curl*, 26 Eng.Rep. 608 (Ch.1741), Alexander Pope sued a bookseller who proposed to market a volume of letters written by Pope and other eighteenth century luminaries. The Chancellor enjoined publication on the ground that an author of any letter—be it "learned" or "familiar"—had a common law right to control first publication in the same way that the author of a poem or a treatise could control first publication of those works. Two other early cases (one pre-dating *Pope*) also recognized a protectible property interest in private papers but neither of those opinions are extant. *Webb v. Rose* (1732) (publication of dead person's drafts enjoined) and *Forrester v. Waller* (1741) (publication of surreptitiously-obtained notes enjoined) survive only in the discussion in *Millar v. Taylor*, 98 Eng.Rep. 201, 216 (K.B.1769).

Only one other case involving letters appeared in English case law prior to adoption of the American Constitution. *Thompson v. Stanhope*, 27 Eng.Rep. 476 (Ch.1744) (wife of illegitimate son of Lord Chesterfield cannot publish father's letters to son). Nevertheless, post-Revolutionary American courts continued to refer to contemporaneous English precedents in their effort to define this author's right of common law copyright.

A review of the most important nineteenth and twentieth century case law demonstrates that while common law copyright

may have developed primarily to supplement the economic protections of statutory copyright, it was never solely concerned with the financial interests of authors. Despite some early hesitation, see, e. g., *Perceval v. Phipps*, 35 Eng.Rep. 225 (Ch.1813) (suggestion that publication of private letters with no economic value to author cannot be enjoined), *Wetmore v. Scovell*, 6 N.Y.Ch.Rep. 745 (1842) (applies *Perceval*); *Hoyt v. MacKenzie*, 5 N.Y.Ch.Rep. 917 (1848) (same), courts ultimately and explicitly expanded the theory of common law copyright to encompass a nonpecuniary interest in the privacy of letters.

The landmark English decision was *Gee v. Pritchard*, 36 Eng.Rep. 670 (Ch.1818)—a case cited with approval by the New York Court of Appeals in *Roberson*, 171 N.Y. at 549, 64 N.E. at 445, when rejecting the modern right of privacy but affirming equivalent older concepts based upon property rights. It involved a threat by Pritchard, the illegitimate son of the late Mr. Gee, to publish personal letters Mrs. Gee had written to him. The case distinguished away the seemingly contradictory holding of *Perceval* as one dealing with "consent" of the author to publish, and reaffirmed the conclusion in *Pope* that familiar letters were fully protected by common law copyright. The Chancellor went on to add:

I do not say I am to interfere because the letters are written in confidence, or because publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

36 Eng.Rep. at 678.

The Chancellor's view was adopted by Justice Story in *Folsom v. Marsh*, 9 Fed. Cas. 342 (1st Cir. 1841)—one of the earliest and fullest discussions in American case law of the rights of the author in personal correspondence. No meaningful distinction, Story felt, could be drawn between personal

letters and literary works; common law copyright, therefore, must be said to protect both.

Story expounded further on this theme in his treatise on equity jurisprudence, where he eloquently urged that the true value preserved in many instances by the application of common law copyright was not dollars and cents but privacy. His thesis greatly influenced American courts and was explicitly adopted in New York in *Woolsey v. Judd*, 11 Super.Ct. (4 Duer) 379, 11 How.Pr. 49 (N.Y.1855). The court placed its decision squarely on the need of society for a "free interchange," writing:

Our own views and feelings, we do not hesitate to declare, correspond entirely with those which Mr. Justice Story, in the most elaborate and useful of his works, has very forcibly expressed. We agree with him, that the unauthorized publication of [personal] letters, "unless in cases where necessary to the vindication of the rights or conduct of the party against unjust claims or imputations, is perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice, opinions and sentiments, which seems essential to the well-being of society . . ." (2 Story's Equity Jur. § 946.)

11 Super.Ct. (4 Duer) at 383, 11 How.Pr. at 53-54.

To drive the point home even more sharply that common law copyright is a device by which New York courts protect the privacy interest in the property of a letter, the opinion concluded:

[I]t is with no ordinary satisfaction that, in closing this discussion, we find ourselves in a condition to affirm that the rules of law relative to the publication of private letters, are in perfect harmony with those of social duty and sound morality, and, in the protection which they afford to individuals, consult and promote the highest interests of society.

11 Super.Ct. (4 Duer) at 407, 11 How.Pr. at 79.

The few subsequent New York cases to consider the issue have reaffirmed the theme that common law copyright protects an author's privacy as well as his pocket-book. *In re Ryan's Estate*, 115 Misc. 472, 188 N.Y.S. 387 (Sur.Ct.1921); *Estate of Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 297 N.Y.S.2d 51 (Sup.Ct.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1967), *aff'd*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968). See also *Rice v. Williams*, 32 F. 437, 439 (7th Cir. 1887) ("traffic in the letters of third parties, without their knowledge or consent" is "disreputable business" and an abuse of confidentiality); *Dock v. Dock*, 180 Pa.St. 14, 36 A. 411 (Sup.Ct.1897) (in suit for alienation of affections defendant entitled to return of letters stolen by plaintiff); *King v. King*, 25 Wyo. 275, 168 P. 730 (1917) (defendant barred from using letters against author and addressee to disgrace them in a social organization).

[16] The doctrine of common law copyright, as accepted in New York and elsewhere, protects plaintiffs Birnbaum and MacMillen. They each wrote a letter which was opened and read, without their permission and without the protections of a particularized warrant, by a third person. The letters were then copied, read by other government agents, and incorporated into the files of the CIA. Although the agency did not publish the letters in the ordinary sense of including them in a book, magazine, pamphlet, or newspaper for public distribution, they did publish them within the meaning of that term for common law copyright purposes. In *In re Ryan's Estate*, 115 Misc. 472, 475, 188 N.Y.S. 387, 389 (Sur.Ct.1921), for example, the court termed the simple act of delivery of letters to the temporary administrator of an estate a "publication." In *Dock*, the Supreme Court of Pennsylvania speaks of an author's right to prevent the "communication [of personal letters] to other persons . . . by the party wrongfully in possession of them." 180 Pa.St. at 22, 36 A. at 412. Similarly, in *King* the offense which concerned the court was not the threat of printing the letters

but the threat of showing them to unauthorized persons.

[17] The same conclusion follows with respect to Avery, despite the fact that he was the recipient of, rather than the author of, the illicitly opened mail. The law has recognized, for practical reasons, that the recipient, too, has an interest in the letter and certain rights pertaining to it. Were this not so, the addressee of a letter would be unable to exercise the normal kinds of control over his or her mail, including the power to discard a letter once it has been read, or the right to show the letter (except where a breach of confidence might occur) to an interested friend or member of the household. See, e.g., *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); *Folsom v. Marsh*, 9 Fed.Cas. 342 (1st Cir. 1841).

Under some circumstances, the recipient has even been deemed to have a right superior to the author's, enabling him to publish a given letter over the author's objections. As Justice Story recognized in *Folsom*:

"[T]he persons to whom [letters] are addressed, may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters . . . as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. . . . In short, the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character.

9 Fed.Cas. at 346. Accord, *Baker v. Libbie*, 210 Mass. at 605-06, 97 N.E. at 111.

[18] The clear import of common law copyright cases dealing with personal letters, taken as a whole, is that a recipient has a definite property interest in the writing which is also protectable by the courts. The "sound morality" language used by the court in *Woolsey v. Judd*, 11 Super.Ct. (4 Duer) 379, 11 How.Pr. 49 (N.Y.1855), for example, is broad enough to encompass a party in Avery's position. See also *Gee v. Pritchard*, 36 Eng.Rep. 670, 678 (Ch.1818), which calls "the ground of property" a firm enough one on which to support the protection of personal rights.

While one court did refuse to recognize, for lack of any precedent, the right of an addressee of a letter to enjoin publication of the correspondence, it specifically noted that no issue of invasion of privacy had been raised by the plaintiff at trial. *Knights of the Ku Klux Klan v. International Magazine Co.*, 294 F. 661 (2d Cir. 1923). In contrast, the Wyoming state Supreme Court has declined to distinguish between the author and the recipient of personal letters. It found that both had an interest in enjoining a third person from using those letters "willfully, and maliciously, to injure, defame, and humiliate." *King v. King*, 25 Wyo. 275, 281, 168 P. 730, 731 (1917). Cf. *Dock v. Dock*, 180 Pa.St. 14, 36 A. 411 (1897).

The courts' rationale for finding "property" in nonliterary letters has been their concern with preventing violations of confidence and privacy. It is unreasonable to suppose that they would hold that it was only the writer of a letter who could be embarrassed or whose confidence could be breached by its unwarranted exposure.

Particularly in a continuing correspondence between father and son, the child's letter to the parent is likely to refer to, and reveal, the elder's prior remarks. To protect the recipient's rights is, therefore, indirectly to protect him as a writer. The law recognizes this necessary interaction of communicator and communicant, refusing to exclude from its protection one of two actors. It is, for example, this reason that underlies the shielding of advice given by a

lawyer to his client as part of a privilege designed to protect the client's communications. See, e.g., McCormick, Evidence § 89 at 182-83 (2d ed. E. W. Cleary, 1972).

This principle of mutuality, recognizing that both writer and recipient have a stake in freedom from interference with their correspondence; was articulated in a recent Supreme Court decision involving censorship of the mails in prisons. The Court pointed out:

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.

We do not deal here with difficult questions of the so-called "right to hear" and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed.

Procunier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974) (citations omitted).

It is not significant that Avery technically had no property interest in the letter at the time it was opened. While, for most purposes, letters do remain the physical property of the author until they are delivered by the Post Office, the addressee in these circumstances has, at the very least, an inchoate property interest sufficient to render his right of privacy protectible.

Any other result would create the anomalous situation where a plaintiff such as Avery could obtain redress if his mail were purloined from his home mailbox by the CIA, photographed, and returned, but could not recover if the very same acts were committed minutes before the post was delivered to his address.

3. Violation of Constitutional Rights as Tortious Conduct.

[19] Violation of plaintiffs' federal constitutional rights is yet a third ground of liability under New York law. New York treats tortious conduct, in violation of the Constitution, by government agents as grounds for recovery of damages.

The illicit mail openings in these cases directly contravene the letter and spirit of the Bill of Rights. The Constitution and the first ten amendments to it created a central government whose powers to encroach upon the personal and political lives of its citizens were carefully limited. Of particular concern to the drafters was protection of ideas—including their tangible embodiment in books and private papers—from interference by public officials.

In England and the Colonies, citizens had been aggrieved by such abusive practices as the use of general warrants to search homes and businesses of British subjects for politically suspect documents. *W. Ringel, Searches & Seizures, Arrests and Confessions* § 2 at 2-3 (1972). In 1765, one English court proclaimed that if general warrants to search for seditious papers were held valid,

the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect a person to be the author, printer, or publisher of a seditious libel.

Entick v. Carrington, 19 State Tr. 1029, 1063 (C.P.1765). The opinion in *Entick* leaves little doubt that the right to protect private papers was recognized as part of the complex of liberties that would be in-

fringed were the government permitted unchecked power to rifle at will through letters, books and other communications:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and although the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

19 State Tr. at 1066.

[20] The Supreme Court has long recognized that freedom of speech and the right to be free from unreasonable searches and seizures extends not merely to the person and immediate surroundings of individuals, but to their correspondence as well. In 1878, the Court first applied the Fourth Amendment to letters and sealed packages:

[They] are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. Whilst in the mail, they can only be opened and examined under

warrant as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and sealed packages in the mail.

Ex Parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877 (1878). See also *Bloustein, Group Privacy: The Right to Huddle*, 8 Rutgers-Camden L.J. 219, 225 (1977). Later cases recognized that First Amendment values were also infringed by "unjustified governmental interference" with personal letters and other mail. *Procurier v. Martinez*, 416 U.S.

396, 409, 94 S.Ct. 1800, 1809, 40 L.Ed.2d 224 (1974). Cf. *Lamont v. Postmaster General of United States*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (refusal to deliver mail deemed by Post Office to be communist propaganda unless addressee formally requests it violates First Amendment); *United States v. Ramsey*, — U.S. —, —, 97 S.Ct. 1972, 1982, 52 L.Ed.2d 617 (1977) (first class mail may not be opened). Given this background, plaintiffs' expectations of privacy in their mail were fully justified.

[21] That damages would be available in New York's courts to plaintiffs whose constitutional rights have been violated by public agents is not surprising, but is, rather, implicit in the whole tenor of American jurisprudence. As early as 1803, Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 163, 2 L.Ed. 60:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

The Supreme Court, in deciding that plaintiffs could recover damages from individual FBI agents for violations of their Fourth Amendment rights, relied upon this language from *Marbury* to support its holding that a "petitioner, if he can demonstrate an injury . . . is entitled to redress his injury through a remedial mechanism normally available in the federal courts." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 819 (1971). See also *Dellums v. Powell*, 561 F.2d 242 (D.C.Cir.1977) (violation of First Amendment rights). The fact that it is a government official who violates the Constitution is an aggravating, not a mitigating, factor. In *Bivens* the Court wrote:

Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a

magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

403 U.S. at 391-92, 91 S.Ct. at 2002 (citations omitted). Cf. relying on *Bivens*: *People v. Feinlowitz*, 29 N.Y.2d 176, 187, 324 N.Y.S.2d 62, 71, 272 N.E.2d 561, 567 (1971) (Burke, J., dissenting), cert. denied, 405 U.S. 963, 92 S.Ct. 1175, 31 L.Ed.2d 239 (1972); *Newell v. City of Elgin*, 34 Ill.App.3d 719, 340 N.E.2d 344 (1976); *Cashen v. Spann*, 125 N.J.Super. 386, 311 A.2d 192 (App.Div. 1973), modified, 66 N.J. 541, 334 A.2d 8, cert. denied, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 46 (1975).

[22] The New York Court of Appeals shares the general view that plaintiffs are entitled to damages when they are personally harmed by violation of their constitutional rights. In *People v. Defore*, 242 N.Y. 13, 150 N.E. 535 (1926), for example, then-Judge Benjamin Cardozo rejected the exclusionary rule in cases of Fourth Amendment violations by state officials in favor of such alternative remedies available in New York as civil money damages. More recently, in *People v. DeBour*, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976), the Court of Appeals reiterated its assumption that damages were available in such cases. In discussing limits on the right of police to

approach and question citizens on the streets, the Court wrote:

The basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government. Therefore, any time an intrusion on the security and privacy of the individual is undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity, the spirit of the Constitution has been violated and the aggrieved party may invoke the exclusionary rule or appropriate forms of civil redress. It is in this vein that the defendant urges that his right as a citizen to walk the streets unimpeded by the State has been trammelled.

40 N.Y.2d at 217, 386 N.Y.S.2d at 380-81, 352 N.E.2d at 567-68 (emphasis supplied). See also granting damages in situations where constitutional violations occurred: *Fradley v. State*, 19 A.D.2d 783, 242 N.Y.S.2d 95 (3d Dep't 1963) (money damages when a state trooper entered home without a warrant); *Herman v. State*, 78 Misc.2d 1025, 357 N.Y.S.2d 811 (Ct.Cl.1974) (money damages when police executed a no-knock warrant for the wrong house); *Casler v. State*, 33 A.D.2d 305, 307 N.Y.S.2d 695 (4th Dep't 1970) (damages awarded for arrest based on search of car without probable cause); *Baisch v. State*, 76 Misc.2d 1006, 351 N.Y.S.2d 617 (Ct.Cl.1974) (damages to plaintiff who had been arrested for "desecrating" the American flag); *Brenon v. State*, 31 A.D.2d 776, 297 N.Y.S.2d 88 (4th Dep't 1969) (damages not awarded because plaintiff had consented to search); *Nader v. General Motors Corp.*, 57 Misc.2d 301, 292 N.Y.S.2d 514 (Sup.Ct.1968) (violation of constitutional right to privacy could be remedied by an award of damages), *aff'd on other grounds*, 31 A.D.2d 392, 298 N.Y.S.2d 137 (1969), *aff'd*, 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970).

III. CLASS ACTION INAPPROPRIATE

[23] One of the plaintiffs, Mary Rule MacMillen, moved to certify her suit as a

class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The proposed class consisted of all United States residents and citizens whose first-class mail was opened by government agents as part of the HTLINGUAL program and it included both writers and recipients of letters sent into and out of the United States.

The court must find that a class action is superior to other means for a fair and efficient adjudication of the controversy. Specifically it must determine that:

the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. Rule 23(b)(3). Justice would not be served by such certification.

[24] First, the injured here are not easily identified. Although the opening and copying of correspondence without warrant is an undoubted intrusion involving important civil liberties, not all citizens will consider themselves harmed by those acts, or desire any recompense. Some may believe for personal or political reasons that the government—even if it violated the law—should not be sued for actions taken in the name of an arguably legitimate concern for national security. Others may feel that the CIA and the FBI have an absolute right to conduct such security operations and suffer no subjective sense of injury. Still others whose mail was opened may simply feel indifferent about the fact and not, therefore, be damaged in a compensable way.

The issue of class identification is further complicated by the fact that many, if not most, of those affected by HTLINGUAL remain unaware of the fact. Since this is a tort where the individual—as opposed to the public or social—damage flows primarily from the knowledge of the wrong, the bulk of potential class members probably have not been substantially injured.

Second, were this case to be treated as a class action, little practical advantage would accrue to the individual members of the class. All potential plaintiffs share only one question in common: is the United States liable under the applicable federal and state law for harm which may have resulted to any individual from these unauthorized interferences with the mail? Since the facts on which liability—as opposed to damages—rests are undisputed, extensive testimony is not required in each successive case to establish the factual underpinnings of the tort claim. The only question regarding liability will be legal. Future litigants will not be forced to spend large sums to reduplicate complex testimony from numerous witnesses. They will not even bear the burden of preparing extensive, expensive and repetitive briefs since the ultimate determination of the law in this case, assuming that it is followed, will bind future litigants in actions relating to HTLINGUAL. Cf. *Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1313, 1394-1402 (1976).

Third, a class action would present inordinate management problems. Since punitive damages are prohibited by the Tort Claims Act, 28 U.S.C. § 2674, the court could compensate only for actual injuries. The amount of injury could conceivably vary widely from individual to individual, depending on the sensitivity of the letter, the amount of distress experienced, and whether or not any tangible damage could be shown. Since the facts on damages in each case would still have to be determined separately, the court would be enmeshed in a lengthy series of separate trials even if it granted class certification. Cf. *Dellums v. Powell*, 561 F.2d 242 (D.C.Cir. 1977) (dif-

ficulties at trial based on theory of false arrest and imprisonment and violation of First Amendment rights compounded by nature of class).

We need not consider the administrative exhaustion issue requiring the plaintiff in a Federal Tort Claims Act case to attempt first to have his or her claim satisfied by the appropriate administrative agency: 28 U.S.C. § 2675. Compare *McKart v. United States*, 395 U.S. 185, 197, 89 S.Ct. 1657, 1664, 23 L.Ed.2d 194 (1969) (balancing test in Selective Service case); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 9, 246 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975) (Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq.; class may include those who have not filed administrative complaints) with *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 24 (3d Cir. 1975) (exhaustion required in class actions brought under Federal Tort Claims Act). If the decision in these cases is upheld on appeal, the CIA may want to reconsider its refusal to grant relief administratively to other HTLINGUAL complainants. Should that be the case, no further cases in this court on the mail openings would be anticipated. If, however, the agency continues to deny claims, a new set of facts will be presented in subsequent actions which may, on appropriate motion, cause the court to reconsider the issue of class certification. Cf. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv.L.Rev. 1281, 1294 n. 65 (1976).

IV. MEASURE OF DAMAGES

A. Elements Generally

[25] Recovery under the Federal Tort Claims Act is limited to compensatory damages. "The United States shall not be liable for . . . punitive damages." 28 U.S.C. § 2674.

[26] Neither may the award take into account injuries inflicted upon the structure of American democracy. Any theory which would allow private litigants to seek relief on behalf of the entire injured segment of

the public as private attorneys general has no application in this case for two reasons. First, the effect would be punitive, and hence would contravene the limitation in section 2674. Second, it would make little sense to ask the citizenry as a whole to pay damages to these plaintiffs out of the public purse for injuries which the American population itself has suffered en masse. The remedy for the wrong against the nation, therefore, must be supplied by other branches of government.

The plaintiffs in these cases suffered none of the tangible indicia of harm for which a dollar value may easily be assigned. They experienced no financial losses. Their jobs, their reputations and prestige in their communities did not suffer. They were not subjected to intrusive or humiliating investigations by the government. Their homes were not broken into. They were not assaulted or detained. They lost no time from work and incurred no medical expenses. Plaintiff MacMillen did testify that she broke out in hives and suffered some respiratory difficulties shortly after she learned of the CIA action, but even she did not claim damages for physical injury or medical bills.

[27] The lack of objective harm is, however, no bar to recovery. The law generally recognizes that where a person suffers an invasion of the right to privacy, awards are appropriate for general damages covering the injury of invasion itself, as well as for the resulting mental distress. The Restatement (Second) of Torts, § 322H, summarizes the rule in privacy cases:

One who has established a cause of action for unreasonable invasion of his privacy is entitled to recover damages for

- (a) the harm to his interest in privacy resulting from the invasion;
- (b) his mental distress, proved to have been suffered if of a kind which normally results from such an invasion; and
- (c) special damage of which the invasion is a legal cause.

3 Restatement (Second), Section 652d at 401 (1977).

[28] New York has been extremely liberal in granting recovery for mental distress, both as an interest protectible in itself, see, e.g., *Long v. Beneficial Finance Co. of New York*, 39 A.D.2d 11, 330 N.Y.S.2d 664 (4th Dep't 1972), and as an element of damages for other torts such as defamation or false imprisonment. See, e.g., *Bishop v. New York Times Co.*, 233 N.Y. 446, 135 N.E. 845 (1922) (defamation); *Hoffner v. State*, 207 Misc. 1070, 142 N.Y.S.2d 630 (Ct.Cl.1955) (false imprisonment). It is also an element of damages in civil suits for constitutional violations. See *Herman v. State*, 78 Misc.2d 1025, 357 N.Y.S.2d 311 (Ct.Cl.1974). Although appropriate damages for common law copyright are rarely discussed, because most litigants have sought injunctive relief, there is no reason to suppose that allowance would not be made for mental anguish since New York courts grant this remedy in other cases where privacy-related interests are at stake.

[29] The court credits the testimony of the plaintiffs in these cases that they suffered actual mental pain, outrage and shock when they learned that government agents had interfered with their privacy by opening and reading their mail. They are entitled, therefore, to recovery for that injury under any of the three tort theories supporting liability.

The parties are entitled to recover for the invasion of their rights, without respect to the consequences. The Restatement (Second) of Torts suggests that a deprivation of common law privacy is an independent injury for which damages are appropriate. The comment to the damages section of the Restatement notes:

A cause of action for invasion of privacy, in any of its four forms, entitles the plaintiff to recover damages for the harm to the particular element of his privacy which is invaded. Thus one who suffers an intrusion upon his solitude or seclusion may recover damages for the deprivation of his seclusion. One to whose private life publicity is given may recover for the harm resulting to his

reputation from such publicity. One who is publicly placed in a false light may recover damages for the harm to his reputation from the position in which he is so placed. One whose name, likeness or identity is appropriated to the use of another may recover for the loss of the exclusive use of the value so appropriated.

3 Restatement (Second) of Torts, § 652H, Comment at 401-02 (1977). A similar rule applies also to damages for constitutional torts. See, e.g., *Piphus v. Carey*, 545 F.2d 30, 31-32 (7th Cir. 1976) (appeal pending).

Valuation of intangibles is difficult, but not impossible. In ordinary tort suits, judges and juries commonly draw upon the evidence and their shared experience to assess the dollar worth of such imponderables as future pain and suffering. Over time, a range of awards appropriate for certain kinds of losses is established, enabling courts to decide whether a given recovery is reasonable. In this case, however, no precedents are available. For this reason the court decided to seek the assistance of an advisory jury.

B. Advisory Jury Recommendations

[30] While trial by jury is specifically prohibited in Federal Tort Claims Act cases, 28 U.S.C. § 2402, use of an advisory jury is permitted. *Coffland v. United States*, 57 F.R.D. 209 (N.D.W.Va.1972); *Poston v. United States*, 262 F.Supp. 22 (D.Haw. 1966), *aff'd*, 396 F.2d 103 (9th Cir.), *cert. denied*, 393 U.S. 946, 89 S.Ct. 322, 21 L.Ed.2d 285 (1968), *rehearing denied*, 393 U.S. 1072, 89 S.Ct. 724, 21 L.Ed.2d 717 (1969); *Schetter v. Housing Authority of City of Erie*, 132 F.Supp. 149 (W.D.Pa.1955). *Contra Honeycutt v. United States*, 19 F.R.D. 229 (W.D.La.1956). The verdict of such an advisory panel is only part of the data taken into consideration in arriving at the court's independent conclusion.

It was, nevertheless, instructive that this panel of average citizens—representing a broad range of economic, educational, social and political experience—uniformly found that the damages suffered by the plaintiffs in this case were substantial. Although the

jurors were instructed that they could recommend nominal damages of one dollar if they found that the wrong done resulted only in slight harm, none chose this alternative. Three suggested that plaintiffs be awarded \$10,000 each for their mental distress and for the encroachment upon their personal liberty; one suggested \$2500; and the other eight jurors all agreed that \$5000 was the compensation needed to make these plaintiffs whole.

In addition, the verdict of the advisory panel served to affirm the opinion of the court that the emotional distress these plaintiffs suffered was the sort that would be experienced by reasonable people under the almost-unprecedented circumstances of these cases. Since normal principles of tort recovery in privacy do not permit compensation for unusual sensitivity, the consensus of the jurors on this point was particularly useful. The Restatement (Second) of Torts provides that:

The plaintiff [who has established a cause of action for invasion of his privacy] may also recover damages for emotional distress . . . if it is of a kind that normally results from such an invasion and . . . is normal and reasonable in its extent.

3 Restatement (Second) of Torts, § 652H, Comment b at 402 (1977) (emphasis added). It should also be noted that the jury did not find any difference in the degree of damage sustained by any of the three plaintiffs.

C. Court Findings

[31] The court's findings on the damages issue agree substantially with those of the jury. The injuries suffered were substantial. It is entirely reasonable and normal for any citizen whose privacy has been invaded by the government, as it was in these cases, to experience comparable emotional distress. All three plaintiffs should be treated similarly in the absence of substantial proof that any one suffered perceptibly more than the others. Although plaintiff MacMillen's letter was more personal than those of the other plaintiffs, there was insufficient evidence that she suffered enough incremental embarrassment to justify a higher award.

The jurors' damage recommendations were somewhat high. Awards of the magnitude suggested by the advisory verdict have been found only where plaintiffs have suffered objective, observable injuries as a result of interferences with their civil liberties. See, e. g., *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) (\$5000 for loss of job because of the exercise of First Amendment rights); *Manfredonia v. Barry*, 401 F.Supp. 762 (E.D.N.Y.1975) (\$3500 damages upon a finding that rights under the Fourth and First Amendments had been violated; plaintiff spent the night in jail, and was exposed to extensive notoriety in the press and her community); *Zarcone v. Perry*, 75-C-1619 (E.D.N.Y. July 20, 1977) (damage award of \$141,000 for false arrest and imprisonment with handcuffing of the plaintiff, public humiliation and proof of substantial medical expenses and economic loss and substantial punitive damages). Cf. *Dellums v. Powell*, 561 F.2d 242 (D.C.Cir. 1977) (\$7500 excessive for First Amendment violations).

In the instant case it is possible to ameliorate the harm by the government's writing a letter of apology, a possibility raised by the jury. Assurance by the government that it regrets the injury to plaintiffs will serve to soothe their wounded faith in our democratic institutions, give assurances of non-recurrence in the future, and restore some confidence in our government. In analogous defamation cases, New York law recognizes that an apology will mitigate damages, or at least that a failure to apologize will enhance them. See, e. g., *Stefania v. McNiff*, 49 Misc.2d 480, 267 N.Y.S.2d 854 (Sup.Ct.1966); *O'Connor v. Field*, 266 App. Div. 121, 41 N.Y.S.2d 492 (1st Dep't 1943); *O'Leary v. Hearst Magazines, Inc.*, 167 Misc. 481, 4 N.Y.S.2d 79 (Sup.Ct.1937), *aff'd*, 254 A.D. 806, 5 N.Y.S.2d 538, *aff'd*, 280 N.Y. 502, 19 N.E.2d 917 (1938). See also W. Prosser, *Law of Torts* § 115 at 800 (4th ed. 1971); I F. V. Harper & F. James, *The Law of Torts* 408-09 (1956). It is appropriate to apply these precedents to the special facts of this case.

In arriving at an appropriate figure some guidance is found in the amount declared

by Congress as proper compensation in a similar context. Under the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, Congress created a right to civil recovery for individuals whose telephone or oral conversations were intercepted without legal sanction by wiretaps or eavesdropping. The basic damage figure was set at \$100 a day, or \$1000, whichever is larger; special damages, punitive damages and attorney's fees are also recoverable. 18 U.S.C. § 2520. Since the interests sought to be vindicated in these CIA cases and by the Omnibus Crime Control Act provisions are similar, comparability in the size of the non-punitive awards seems reasonable, even though it is the state rather than the federal law of damages that is being applied.

These considerations, as well as the documentary and testimonial evidence, lead to a conclusion that plaintiffs should recover for the violations they suffered, and for the mental distress which followed, in the sum of \$1000 each, provided the government furnishes a suitable letter of regret and assurance of non-recurrence. Of the \$1000, twenty-five per cent is to be paid to the counsel for these plaintiffs as attorney's fees. While this legal fee clearly does not compensate the plaintiffs' talented lawyers for the time devoted to these cases, it is the maximum permitted by statute. 28 U.S.C. § 2678. In addition to the \$1000 in compensatory damages, plaintiffs are also entitled to recover costs. 28 U.S.C. § 2412.

V. CONCLUSION

The American people have already paid a considerable price for the CIA's illegal mail search activities. In addition to the large out-of-pocket expenditures in operating the program, there has been a perceptible widespread loss of confidence in the integrity of the mails and in the right of individuals to be free from surreptitious intrusions into their privacy by government officials. Adding to the taxpayers' burdens by awarding damages in these cases may seem like a regrettable additional disbursement for this ill-starred program. But the law requires that plaintiffs be compensated for their special loss. Moreover, knowledge by

government officials that individuals have effective legal remedies to enforce their rights may deter future illegality. The existence of a court system capable of protecting the right to privacy by granting money damages and other relief against the government and its agents makes our Constitution and laws consequential to our citizens rather than pretentious, empty promises.

The court finds that the United States government, through its agents, committed torts against plaintiffs, causing compensable injury. Each plaintiff shall have judgment for \$1000 plus costs.

So ordered.



In re WESTINGHOUSE ELECTRIC CORPORATION URANIUM CONTRACT LITIGATION.

In re MISCELLANEOUS SECURITIES LITIGATION INVOLVING WESTINGHOUSE ELECTRIC CORPORATION.

S. Sherman Steinberg v. Westinghouse Electric Corp., et al., S.D. New York,
Civil Action No. 75 Civ. 6317.

Franklin Freeman v. Westinghouse Electric Corp., et al., S.D. New York, Civil
Action No. 76 Civ. 3352

Westinghouse Electric Corp. v. Rio Algom Ltd., et al., N.D. Illinois, Civil
Action No. 76C3830.

Homestake Mining Co. v. Westinghouse Electric Corp., N.D. California, Civil
Action No. C-76-2192 RFP
Nos. 235, 295.

Judicial Panel on Multidistrict Litigation.
Aug. 1, 1977.

Motions were filed to transfer certain actions for coordinated or consolidated pretrial proceedings and to vacate orders con-

ditionally transferring certain actions. The Judicial Panel on Multidistrict Litigation held that: (1) where actions already transferred to the Eastern District of Virginia for coordinated or consolidated pretrial proceedings were all contract actions involving defendant's alleged breach of contracts to supply uranium to utilities and defense of commercial impracticability, and trial was imminent in such actions, common factual issues did not warrant transfer to the same district of other actions involving antitrust suit by the uranium supplier, suit by company that was to have provided uranium to supplier, and two securities suits against the supplier, alleging failure to disclose the long-term uranium supply contracts involved in the actions which had been transferred; (2) four securities actions would be transferred for coordinated or consolidated pretrial proceedings with two other securities actions, though plaintiffs in two of the suits acquired their stock pursuant to merger and not on the open market, and (3) the Panel did not have authority to order expedited discovery as an alternative to transfer.

Ordered accordingly.

1. Federal Courts — 153, 156

Where actions already transferred to the Eastern District of Virginia for coordinated or consolidated pretrial proceedings were all contract actions involving defendant's alleged breach of contracts to supply uranium to utilities, and trial was imminent in such action, common factual issues did not warrant transfer to the same district of other actions involving antitrust suit by the uranium supplier, suit by company that was to have provided uranium to supplier, and two securities suits against the supplier, alleging failure to disclose the long-term uranium supply contracts involved in the actions which had been transferred. 28 U.S.C.A. § 1407; U.C.C. § 2-615.

2. Federal Civil Procedure — 9

The Judicial Panel on Multidistrict Litigation does not have the authority, as alter-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED

CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

NORMAN BIRNBAUM,

★ AUG 15 1977 ★
Plaintiff,
TIME AM _____
P.M. _____

JUDGMENT

-against-

UNITED STATES OF AMERICA, et al.,

76 C 1837

Defendants.

B. LEONARD AVERY,

Plaintiff,

77 C 234

-against-

UNITED STATES OF AMERICA,

Defendants.

MARY RULE MACMILLEN,

Plaintiff,

77 C 597

-against-

UNITED STATES OF AMERICA,

Defendant

A memorandum and order of Honorable Jack B. Weinstein, United States District Judge, having been filed on August 17, 1977, containing findings of fact and conclusions of law, and finding that the United States government, through its agents, committed torts against plaintiffs, Norman Birnbaum, B. Leonard Avery, and Mary Rule MacMillen, causing compensable injury and granting each plaintiff recovery in the nature of a letter of apology from the government expressing regret for the violation of his or her rights, and compensatory damages of \$1,000 plus costs, it is

ORDERED and ADJUDGED that plaintiffs Norman Birnbaum, B. Leonard Avery and Mary Rule MacMillen shall each recover of defendant, the United States of America, a letter of apology expressing regret for the violation of his or her rights, and compensatory damages of \$1,000 plus costs.

Dated: Brooklyn, New York
August 15, 1977

Louis C. Czel
Clerk

CH:RCF:gp
F. 770501

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
NORMAN BIRNBAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA, et al.,
Defendants.

B. LEONARD AVERY,

Plaintiff,

-against-

UNITED STATES OF AMERICA, et al.,
Defendants.

MARY RULE McMILLEN,

Plaintiff,

-against-

UNITED STATES OF AMERICA,
Defendant.

----- X
SIRS:

PLEASE TAKE NOTICE that the United States of
America, defendant in the above-entitled actions, hereby
appeals to the United States Court of Appeals for the
Second Circuit from an Order in the above-entitled actions
granting judgment against defendant on August 17, 1977.

Dated: Brooklyn, New York
October 13, 1977

Yours, etc.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By:

RODGER C. FIELD
Assistant U.S. Attorney

[-2-]

TO:

CLERK
UNITED STATES DISTRICT COURT

Rabinowitz, Boudin & Standard, Esqs.
Attorneys for Norman Birnbaum
30 East 42nd Street
New York, New York 10017

Melvin R. Wulf, Esq.
Attorney for B. Leonard Avery
Suite 600
565 Fifth Avenue
New York, New York

Burt Neuborne, Esq.
Attorney for
Mary Rule McMillen
40 Washington Square South
New York, N. Y.

CH:RCF
E. 770501

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
NORMAN BERNBAUM,
Plaintiff,

-against-

UNITED STATES OF AMERICA,
Defendant.

AMENDED NOTICE
OF APPEAL
Civil Action
No. 76 C 1837

B. LEONARD AVERY,
Plaintiff,

-against-

UNITED STATES OF AMERICA
Defendant.

Civil Action
No. 77 C 234

MARY RULE McMILLEN,

-against-

UNITED STATES OF AMERICA,
Defendant.

Civil Action
No. 77C 597

-----X
SIRS:

PLEASE TAKE NOTICE that the United States of
America, defendant in the above-entitled actions, hereby
appeals to the United States Court of Appeals for the
Second Circuit from a judgment in the above-entitled
actions entered on August 18, 1977.

Dated: Brooklyn, New York
October 17, 1977

Yours, etc.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By:

RODGER C. FIELD
Assistant U.S. Attorney.

[-2-]

TO:

CLERK
UNITED STATES DISTRICT COURT

Rabinowitz, Boudin & Standard, Esqs.
Attorneys for Norman Birnbaum
30 East 42nd Street
New York, New York 10017

Melvin R. Wulf, Esq.
Attorney for B. Leonard Avery
Suite 600
535 Fifth Avenue
New York, New York

Burt Neuborne, Esq.
Attorney for Mary Rule McMillen
New York University Law School
40 Washington Square South
New York, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NORMAN BIRNBAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

B. LEONARD AVERY,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

MARY RULE McMILLEN,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Civil Action No. 76 C 1837

FILED

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ OCT 28 1977 ★

TIME A.M. 10-

Civil Action No. 77 C 234

Civil Action No. 77C 597

YOU ARE HEREBY NOTIFIED that plaintiff Norman Birnbaum appeals
to the United States Court of Appeals for the Second Circuit from the
final judgment entered on August 18, 1977.

New York, New York
October 27, 1977

Herbert Jordan
Herbert Jordan
Rabinowitz Boudin & Standard
30 East 42nd Street
New York, New York 10017
(212) 697-8640
Attorneys for Plaintiff Birnbaum

DATE

PROCEEDINGS

77C 597-

28/77	Complaint filed. Summons issued.	(1)
29-77	By WEINSTEIN, J-Civil pre trial order ret 5-6-77 filed. Copies to all parties. mg	(2)
29-77	Summons ret and filed/executed.	(3)
15-77	Defts' interrogatories to plttf filed.	(4)
28/77	Plttf's notice to take deposition on 5/5/77 of CENTRAL INTELLIGENCE AGENCY and F.B.I. filed. (FILED IN 77-C-234 Doc. # 11) lg.	
28/77	Plttf's MEMORANDUM IN SUPPORT of motion for class action certification filed.	(5) lg.
28/77	Notice of motion ret 5/6/77 for an order dismissing the class action allegations set forth in the complaint etc. JLJ	(6)
28/77	Notice to take deposition plttf filed. JLJ	(7)
28/77	Motion to dismiss class action allegations filed. JLJ	(8)
3/77	Copy of letter of Melvin L. Wulf to Roger Field (AUSA) dtd 5/2/77. RE: Advising def's in this case of witnesses and documents requested by plttf's filed. (FILED IN 77-C-234 Document #15) lg.	
7/77	Before WEINSTEIN, J. Case called. 76-C-1837. 77-C-234 & 77-C-597 are consolidated for purposes of trial. Pre-trial conference held and concluded. Trial set for 5/9/77. Court reporter present. lg.	
9-77	Before WEINSTEIN, J.--Case called. Trial ordered & begun. Jurors selected & sworn. Trial cont'd to 5-11-77	
1-77	Govt's trial brief filed in 76 C 1837	---
1-77	Govt's proposed questions to be asked potential jurors filed in 76 C 1837	---
1-77	Govt's memo on matters to be determined prior to trial filed in 76 C 1837	---
5-77	Letter of Burt Neuborne to Judge Weinstein dtd 5-2-77 filed re: letter regarding plttf revealing close personal relationship with Russian Artist, etc. (original entry made in 77 C 234-- changed as per request of chambers.)	(9)
10-77	Defts' proposals for charge to jury filed in 76 C 1837.	---
5-77	By WEINSTEIN, J.--Order dtd 5-2-77 that parties shall arrange for a pre trial hearing, filed on doc. #9. Parties notified. ld	
12/77	Before WEINSTEIN, J. Case called. Trial resumed. Jury charged & marshals sworn. Jury retires for deliberation. Trial continued. to 5/12/77. Court reporter present. lg.	
12/77	Copy of def's proposals for the charge to the jury filed. (FILED IN 76-C-1837 Doc. #47) lg.	
12/77	Copy of plttf's requests to charge filed. (FILED IN 76-C-1837 Doc. # 48) lg.	
2-77	Before WEINSTEIN, J-Case called. Trial resumed. Jury resumes deliberation. Orsers of sustenance for coffee and lunch signed. Jurors return and advise the Court that 8 jurors find for each of the plttfs in the amount of \$5,000. Thre of the jurors find for the plttfs in the amount of \$10,000. One juror finds for the above plttfs in the amount of \$2,500. Advisory jury discharged. All parties to submit briefs. Trial concluded. Decision reserved. mg	
3/77	Stenographer's transcript dtd 5/9/77 filed. (FILED IN 76-C-1837 Document # 31) lg.	
-77	Sten. transcripts dtd 5-11-77 and 5-12-77 filed in 76C 1837. mg	

MARY RULE MAC MILLEN and all others similiary situated -v- U.S.A.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO.
MARY RULE MAC MILLEN etc.		U.S.A.	77-C-597
			PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS	
8/1/77		Letter of Herbert Jordan (atty. for plttf.) to WEINSTEIN, J. dtd 7/27/77. IN RE: Retraction of libelous statement's pursuant to letter of WEINSTEIN, J. dtd 7/26/77 to U.S. Atty. filed. (FILED IN 76-C-1837 Document # 54) <i>lg</i>	
8-9-77		Letter from Rodger C. Field dtd 8-8-77 filed in 76C-1837. <i>mm</i>	---
8-15-77		Post-trial memorandum of Deft USA filed in 76C-1837. <i>mm</i>	---
8-17-77		By WEINSTEIN, J. - Memorandum and order dtd 8-17-77 that the U.S.A. committed torts against plttfs & that plttf shall each have judgment for \$1,000 plus costs filed in 76C-1837 (p/c mailed to attys). <i>mm</i>	
8/17/77		Letter filed to Judge Weinstein from Barbara Allen Babcock re: Govts regret for inconvenience caused by the interference with the plttfs mail, draft of letter enclosed. <i>tk</i>	(10)
8-18-77		Trial brief of USA filed. <i>mm</i>	---
8-18-77		Letter from chambers dtd 7-26-77 filed in 76C-1837. <i>mm</i>	---
8-18-77		Trial memorandum of plttfs filed in 77C-234. <i>mm</i>	---
8-18-77		Deposition transcript of Mary Rule MacMillan on 5-10-77 filed. (p/c mailed to attys). <i>mm</i>	(11)
8-18-77		Deft's reply brief in support of motion to dismiss class action allegations filed. <i>mm</i>	(12)
8-18-77		Memorandum in support of plttf's application for relief in the nature of a protective order filed. <i>mm</i>	(13)
8-18-77	<i>ld</i>	Judg ^{ment} that plttfs Birnbaum, Avery, and MacMillen recover of the USA a letter of apology and compensatory damages of \$1,000 plus costs filed in 76 C 1837. <i>ld</i>	(14)
8/23/77		Copy of letter of Bert Neuborne to Weinstein, J dtd 8/16/77 filed re response to Weinstein, J's suggestion of 7/26 regarding apology from govt. <i>lj</i>	(14)
10-13-77		NOTICE OF APPEAL FILED IN 76 C 1837. Copy of notice forwarded to C of A. <i>ld</i>	---
10/18/77		Amended notice of appeal filed in 76 C 1837. Docket entries and duplicate mailed to the C of A. <i>tk</i>	---
10/26/77		Plttf's Notice of corss appeal, dtd 10/20/77, filed. <i>jm</i> Docket entries and copy of notice of corss appeal mailed to C of A. <i>jm</i>	(15)
10/28/77		Plttf's N. Birnbaum notice of appeal, dtd 10/27/77 filed. Copies of docket entries and notice sent to C of A. Deft notified. (see doc # 67 on 76-C-1837) <i>jm</i>	(67 of 76-C-183)
11/9/77		Civil appeal scheduling order of C of A. dtd 11/3/77 that record on appeal be filed. 11/21/77, etc, filed. <i>jm</i>	(16)
11/9/77		Civil appeal scheduling order dtd 11/7/77 that record be filed 11/25/77 filed. <i>jm</i>	(17)
11-21-77		Civil appeal scheduling order #2 filed in 76-C-1837 <i>fy</i>	---
11/29/77		RECORD ON APPEAL CERTIFIED and mailed to Court of Appeals. <i>lg</i>	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARY RULE MACMILLEN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION
NO.

COMPLAINT

1. This action is brought under the Federal Tort Claims Act 28 U.S.C. §§ 1346(b) and 2671 et seq.

2. Plaintiff MacMillen is a citizen of the United States and a resident of the State of Massachusetts.

3. Defendant is the United States of America.

CLASS ACTION ALLEGATIONS

4. This suit is brought as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, and is maintainable under Rule 23(b) (1) (A), 23(b) (2) and 23(b) (3).

5. The named plaintiff represents the class of all United States citizens and residents whose first-class letters or letter-mail, written and sent by or to them, either from within or destined for the United States, were unlawfully and wrongfully opened, read and photographed by employees of the Central Intelligence Agency, the United States Post Office Department, the United States Postal Service, the Federal Bureau of Investigation, and other government agencies, resulting in the unlawful and wrongful collection, maintenance and dissemination of files relating to them.

6. The class is so numerous as to make joinder of all members impossible. The total number and identity of

class members is known only to defendant's agents, servants and employees, but plaintiff estimates, on information and belief, that the class she represents numbers in the tens of thousands.

7. The common questions of law or fact affecting all members of the class predominate over any questions affecting only individual members to such a degree that a class action is the only method available for the fair and efficient adjudication of this controversy. The prosecution of separate claims by the members of the class would constitute an undue burden on the vindication of their rights, create the risk of inconsistent or varying adjudications, and establish incompatible standards for the defendant's conduct.

8. The claims of the representative party have the same legal and factual basis as the claims of the members of the class. Common relief is sought, and plaintiff will fairly and adequately protect the interests of the class.

FACTS

9. Plaintiff has been informed by defendant's employees, in a letter from the Central Intelligence Agency, dated January 7, 1976, that in 1973 a first class letter written by plaintiff MacMillen was wrongfully and surreptitiously opened, read, photographed, circulated and filed by defendant's agents, servants and employees.

10. On information and belief, agents, servants and employees of the United States conducted a massive, covert, illegal and wrongful operation throughout the United States to intercept, open, read and photograph the contents

of tens of thousands of sealed first class letters deposited in the United States mails by United States citizens and residents, or letters mailed to the United States to be delivered to United States citizens and residents. This illegal, wrongful and unconstitutional activity was conducted for an extended period of time, the length of which is not known to plaintiff, but which includes the period from February 1953 to February 1973.

11. On information and belief, from 1953 to the present, defendant's agents, servants and employees engaged in an extended conspiracy to conduct an illegal and wrongful program to collect and maintain files concerning the plaintiff and others, and to widely disseminate the contents of those files, including copies of their illegally seized mail, throughout agencies of the defendant and to persons not employed by the defendant.

12. On information and belief, employees of the defendant wrongfully engaged in an extended conspiracy unlawfully to conceal the acts complained of in paragraphs 10 and 11 from plaintiff and from the public.

13. At the time of the acts described in paragraphs 9 through 12, defendant's employees who wrongfully committed the acts were regularly in the service and employ of the defendant and were acting within the scope of their office or employment.

14. At no time did defendant's agents, servants and employees have the authority of a warrant issued by a judicial officer to search and seize plaintiff's sealed first-class letter, nor did defendant's agents, servants and employees have any lawful authority to search

and seize plaintiff's sealed first-class letter without a warrant.

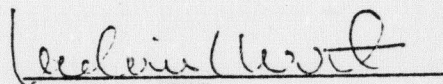
15. On information and belief, all or some of the acts described occurred in the State of New York.

16. On July 29, 1976, plaintiff filed a claim for damages, as required by 28 U.S.C. § 2675, with the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Justice and the United States Postal Service. The claim was denied by the Central Intelligence Agency, by letter dated January 14, 1977. The United States Postal Service, the Department of Justice and the Federal Bureau of Investigation have failed to make a final disposition of the claim, and plaintiff hereby deems such failure to be a denial of the claim, as authorized by 28 U.S.C. § 2675. This suit is commenced within six months of the denial of these claims, as required by 28 U.S.C. § 2401.

17. The wrongful acts of defendant's agents, servants and employees, as described above, injured plaintiff under circumstances where the United States, if a private person, would be liable to plaintiff in accordance with the law of the State of New York.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of \$20,000 compensatory damages for the interception, opening, reading, photographing, copying, circulating and/or filing of, and/or other wrongful interference with, the letter belonging to plaintiff, plus costs and attorneys' fees.

Respectfully submitted,


MELVIN L. WULF
Suite 600
565 Fifth Avenue
New York, New York 10017

JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

RICHARD W. ZACKS
Winograd, Shine & Zacks
2220 Hospital Trust Tower
Providence, Rhode Island 02903

BURT NEUBORNE
New York University Law School
40 Washington Square South
New York, New York 10012

Attorneys for Plaintiff

Dated: March , 1977

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

MARY RULE McMILLEN,

Plaintiff

-against-

UNITED STATES OF AMERICA,

Defendant

Notice of
Cross Appeal
Civil Action
No. 77C. 597

SIRS:

PLEASE TAKE NOTICE that Mary Rule McMillen, plaintiff in the above entitled action, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from so much of the judgment entered in the above-entitled action on August 18, 1977 as declined to certify plaintiff's action as a class action pursuant to Rule 23 FRCP.

Dated: New York, New York
October 20, 1977

Yours etc.

Burt Neuborne

BURT NEUBORNE
40 Washington Square South
New York, New York 10012
212/598-2713
Attorney for Plaintiff

TO: CLERK,
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

DAVID G. TRAGER
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NORMAN BIRNBAUM,

Plaintiff,

-against-

UNITED STATES OF AMERICA, et al.,

Defendants.



Civil Action No. 76-1837

STIPULATION OF FACTS

Plaintiff Norman Birnbaum and defendant United States of America, through undersigned counsel, hereby stipulate and agree that the following facts are to be taken as true for purposes of this case:

1. One or more CIA employees opened a sealed envelope containing plaintiff's correspondence. The envelope containing plaintiff's correspondence was opened on or about September 29, 1970, at a mail intercept site at JFK Airport in New York, New York.

2. The purpose of CIA in obtaining copies of plaintiff's correspondence was to examine mail destined for the U.S.S.R. which fell into certain categories. One such category covered Soviet institutions of learning. Since plaintiff was not identified on the envelope intercepted by the Central Intelligence Agency and Central Intelligence Agency records do not show that he was on any "watch lists," it is apparent that the plaintiff was not the target of any investigation by the Central Intelligence Agency. Following interception and photocopying of his letters, plaintiff's letters, as well as all other letters which were opened and photocopied, were retained in CIA files as a normal course of business.

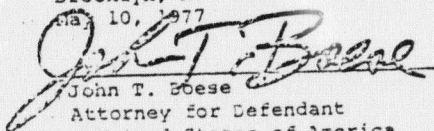
3. Four copies of plaintiff's correspondence are known to have been made. The first copy was made on or about September 29, 1970; the other three copies on an unknown date probably shortly thereafter. The copies were apparently made to record any foreign intelligence or counter intelligence which was contained therein. The first copy has been and continues to be maintained in the mail intercept project file to which access is limited to individuals responding to FOIA requests, tort claims, or litigations. The remaining three copies were circulated within three internal components, returned to the project document repository and apparently destroyed; these copies have not surfaced in searches of CIA records. There is no evidence that copies of plaintiff's correspondence were distributed to other agencies. Copies of the correspondence were distributed to at least four individuals. Apart from the copy in the project file for this litigation, no other copies of plaintiff's correspondence are known to have been distributed to any file.

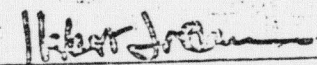
4. No warrant was obtained by the CIA in connection with opening, copying or distributing plaintiff's mail as referred to above.

5. The CIA employees opened, copied and distributed plaintiff's mail while conducting an intelligence and counter-intelligence activity with the knowledge and approval of their superiors.

Brooklyn, New York

May 10, 1977


John T. Boese
Attorney for Defendant
United States of America


Herbert Jordan
Attorney for Plaintiff
Birnbaum

Report of the Department of Justice Concerning
Its Investigation and Prosecutorial Decisions
with Respect to Central Intelligence Agency Mail
Opening Activities in the United States



The Department of Justice has decided, for reasons discussed in this report, not to prosecute any individuals for their part in two programs involving the opening of mail to and from foreign countries during the years 1953 through 1973.

On June 11, 1975, the President transmitted to the Attorney General the Report of the Commission on CIA Activities within the United States (the Rockefeller Commission). The President asked the Department of Justice to review the materials collected by the Commission, as well as other relevant evidence, and to take whatever prosecutorial action it found warranted. At the direction of the Attorney General, the Department's Criminal Division conducted an investigation to determine whether any government officer or employee responsible for CIA programs described in Chapter 9 of the Commission Report, involving the opening of mail taken from United States postal channels, or responsible for related or similar activities of the Federal Bureau of Investigation, had committed prosecutable offenses against the criminal laws of the United States. Such an investigation was immediately begun by the staff of the Criminal Division and regular reports on its status were made to the Attorney General.

On March 2, 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities acceded to the Department's request that the Criminal Division be allowed access to the documentary evidence in its possession

concerning the projects. In August 1976 the Criminal Division submitted to the Attorney General a report summarizing the evidence it had acquired, and analyzing the legal questions that potential prosecutions would present. The report concluded that it was highly unlikely that prosecutions would end in criminal convictions and recommended that no indictments be sought.

Because of the importance of this recommendation and its conclusion that a prosecution would so likely fail, the Attorney General and the Deputy Attorney General asked the Criminal Division to review its analysis and findings, and in addition asked experienced criminal lawyers in the Tax Division to undertake a review. As part of the review process, three experienced United States Attorneys, and two specially appointed consultants, Professors Herbert Wechsler and Philip B. Kurland, were asked to participate in an evaluation of the recommendations with the Attorney General, the Deputy Attorney General, the Solicitor General, and the Assistant Attorney General for the Criminal Division.^{1/}

^{1/} In the course of these deliberations, it became clear that no decision to prosecute could responsibly be made on one of the two mail opening projects -- the West Coast Project which is described on pages 20-21, infra -- within the five year statute of limitations set forth in 18 U.S.C. §3283. In any event, it was the unanimous view that, because the West Coast Project was of relatively brief duration, small in scale, and directed only to incoming mail, any potential prosecution inevitably would focus on the CIA's East Coast mail openings, described on pages 7-19. These openings ended in early 1973, and only the last year of the project is within the statute of limitations. This is enough, however, to allow a prosecution to be commenced with respect to these acts and the entire agreement, dating to 1953, to open mail.

The Department has now completed its investigation into the mail opening projects and has examined in detail the elements of the crimes that may have been committed, the defenses that might be presented, and the proof that would be required to establish the commission of crimes and refute the expected defenses.

Although the Department is of the firm view that activities similar in scope and authorization to those conducted by the CIA between 1953 and 1973 would be unlawful if undertaken today, the Department has concluded that a prosecution of the potential defendants for these activities would be unlikely to succeed because of the unavailability of important evidence ^{2/} and because of the state of the law that prevailed during the course of the mail openings program.

It would be mistaken to suppose that it was always clearly perceived that the particular mail opening programs of the CIA were obviously illegal. The Department believes that this opinion is a serious misperception of our Nation's recent history, of the way the law has evolved and the factors to which it responded -- a substitution of what we now believe is and must be the case for what was. It was until recent years by no means clear that

^{2/} Important evidence would be missing because of the great length of time between the commencement of the mail openings and the holding of a potential trial. Many important participants in the process have died, and because some of the events occurred a generation ago, the memories of other witnesses have dimmed.

the law and, accordingly, the Department's position, would evolve as they have. A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats. The view both inside and, to some extent, outside the government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope. For a variety of reasons judicial decisions touching on these problems were rare and of ambiguous import. Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct that would give rise to the prosecution. They also would support defenses, such as good faith mistake or reliance on the approval of government officials with apparent authority to give approval. Whether these arguments would be acceptable legal defenses is not necessarily dispositive. As Judge Leventhal has reminded us: 3/

Our system is structured to provide intervention points that serve to mitigate the inequitable impact of general laws while avoiding the massive step of reformulating the law's requirements to meet the special facts of one harsh case. Prosecutors can choose not to prosecute, for they are expected to use their "good sense. . . conscience

3/ United States v. Barker, C.A.D.C., No. 74-1383, decided May 17, 1976 (dissenting opinion), quoting from United States v. Dotterweich, 320 U.S. 277, 285 (1943).

and circumspection" to ameliorate the hardship of rules of law. Juries can choose not to convict if they feel conviction is unjustified, even though they are not instructed that they possess such dispensing power.

These factors would make difficult a showing of personal guilt. The issue involved in these past programs, in the Department's view, relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves a general failure of the government, including the Department of Justice itself, over the period of the mail opening programs, ever clearly to address and to resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power. The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to support the notion that the governmental power, in scope and manner of exercise, was not subject to restrictions that, through a very recent evolution of the law and the Department's own thinking, are now considered essential. In such circumstances, prosecution takes on an air of hypocrisy and may appear to be the sacrifice of a scapegoat -- which increases yet again the likelihood of acquittal. And in this case, an acquittal would have its own costs -- it could create the impression that these activities are legal, or that juries are unwilling to apply legal principles rigorously in cases similar to this.

Where a prosecution, whether successful or not, raises questions of essential fairness, and if unsuccessful could defeat the establishment of rules for the future, the Department's primary concern must be the proper operation of the government for the present and in the future. The Department of Justice has concluded, therefore, that prosecution should be declined. At the same time, however, the need of eliminating legal ambiguities and of guiding future conduct in this field demands a precise public statement of the Department's position on the law -- namely, that any similar conduct undertaken today or in the future would be considered unlawful. Ordinarily public announcements of reasons for declining prosecution are not made, for they may invade the privacy of the potential defendants and charge them with misconduct while denying them an opportunity to respond in court. The circumstances of this case justify an exception to that rule. Publication of the Rockefeller Commission and Senate Select Committee reports, with their extensive descriptions of the mail opening programs, substantially diminishes any harm to the potential defendants' reputations that could be caused by public explanation of the Department's position. The harm is further diminished by the description of the circumstances and the considerations of fairness on which the Department's decision not to prosecute ultimately rests.

I. SUMMARY DESCRIPTION OF ORIGINS, CONDUCT AND
TERMINATION OF CIA MAIL OPENING ACTIVITIES
IN THE UNITED STATES.

Investigations conducted by the Rockefeller Commission, the Senate Select Committee, and the Department of Justice disclose that between 1953 and 1973 the CIA engaged in five separate projects involving the opening of mail in United States postal channels. The "East Coast Project" began in 1953 and ended early in 1973; the "West Coast Project" was carried out intermittently from 1969 to 1971. Three remaining projects were of brief duration and ended more than a decade ago. Prosecution for violations arising out of all but the East Coast Project is barred by the statute of limitations.

A. East Coast Mail Project

In 1952 the CIA, investigating the possibility of gaining positive and operational intelligence information from first-class mail to or from the Soviet Union, found that all such mail was sent through postal facilities in the New York City area. Postal inspectors were contacted and, with their cooperation, plans were made for CIA personnel to conduct surveillance of United States-Soviet mail.

In February 1953, when the program was implemented, CIA personnel from the Office of Security were permitted to examine and copy (by hand) information from envelope exteriors

under the close supervision of a postal inspector, but they were admonished that the mail could not be tampered with or delayed. From the very outset of this operation, however, the CIA planned to convert the project into a mail opening operation. The major obstacle to accomplishing this goal was the constant presence of a postal inspector. The CIA thought that if it could establish procedures to photograph the exterior of the mail, it could obtain relatively unsupervised access to the mail.

Such an expansion of the operation required contact by Director of Central Intelligence ("DCI") Allen Dulles with postal officials. An undated memorandum prepared by the CIA's Director of Security in late 1953 noted that the New York mail operation was at that time confined to the inspection of covers only. It recommended that the project be discussed as soon as possible with the President and that a secret White House directive be issued jointly to the Central Intelligence Agency and the Post Office Department requesting those organizations to make a "study" on the subject of the censorship of foreign mail. The memorandum noted that the CIA could then disclose its desires and requirements to the Post Office Department and take steps to implement the program on an expanded scale. This memorandum was not formally transmitted to Dulles but, on January 4, 1954, the Director of Security forwarded

a memorandum to Dulles which recommended that CIA seek expanded access to the mails from the Postmaster General for the purpose of photographing covers; the Director of Security also recommended that the "oral approval" of the President be obtained.

In May 1954 Director Dulles, accompanied by then Chief of Operations Richard Helms, briefed Postmaster General Arthur Summerfield about the CIA's desires for expanded access and means to photograph envelope exteriors. The Chief Postal Inspector agreed to permit such photographing. A contemporaneous CIA memorandum of that briefing makes no reference to any discussion of mail openings. The Chief Postal Inspector specifically recalled, in a 1975 interview, that DCI Dulles argued that the Soviets opened mail and, therefore, that the CIA's efforts were unfairly circumscribed by American postal practices. However, the Inspector, now deceased, recalled that he had told DCI Dulles that any opening of letters would, in his view, be a violation of postal law.

Following this briefing, the CIA obtained private rooms at two New York postal facilities. Although some information suggests that a very few selected openings may have occurred as early as July 1953, available evidence indicates that the selective opening and reading of letters with some regularity began in late 1954.

The Department has been unable conclusively to establish whether, as recommended in the January 4, 1954, memorandum, and as suggested by certain individuals in testimony before the Rockefeller Commission and Congress and in statements to Department representatives, the CIA obtained authorization from President Eisenhower to open and read mail. There is, however, evidence suggesting that President Eisenhower had knowledge of and had approved the CIA's East Coast operation.

Opinions regarding President Eisenhower's knowledge and approval were expressed by close associates of both President Eisenhower and DCI Dulles. Their judgments are based on experience with government operations, and their own knowledge of the individual characteristics and habits of Eisenhower and Dulles. For example, one high level official stated that no substantial CIA operation would have been undertaken without at least tacit White House approval. Another expressed the opinion that the CIA mail operation was the type of operation which would have been cleared with President Eisenhower by Allen Dulles. This same official recounted a Cabinet level discussion with President Eisenhower in which the reading of incoming Soviet mail was raised, but he was uncertain about the context in which the subject was discussed. Still another official in the Eisenhower Administration said it is "inconceivable" that Allen Dulles would

have embarked on any program as sensitive as the East Coast mail intercept without first informing the President. Former associates of Allen Dulles stated that Mr. Dulles was most conscientious about keeping President Eisenhower informed of the operations of the CIA.^{4/} A former close associate of Mr. Dulles indicated that in about 1960 he was officially advised by a Dulles assistant that Mr. Dulles had informed President Eisenhower of the CIA's mail intercept project.

The absence of any conclusive evidence of presidential authorization should be considered in light of the well-observed, but seldom discussed, practice described as "plausible deniability" or "presidential deniability." Knowledgeable witnesses have noted that there existed in high government circles a long-standing aversion to making written records of presidential authorizations of sensitive intelligence-related operations.^{5/} It was thought that the conduct of foreign

4/ Foreign intelligence matters were of great interest to President Eisenhower, and he frequently consulted with DCI Allen Dulles and his brother, Secretary of State John Foster Dulles, concerning such matters.

5/ An example of this practice is the handling of the U-2 matter. According to high level officials, President Eisenhower personally approved all U-2 overflights, including the one in which an American pilot was shot down over Soviet territory just before the 1960 Paris summit conference. One former Eisenhower aide had first-hand knowledge that President Eisenhower made his U-2 approvals orally, and that no written records of such authorizations were made.

affairs frequently required the practice of non-recording of such presidential authorizations. Covert actions were, by National Security Council definition, designed so that the United States Government could plausibly disclaim any responsibility for them. The concept of plausible or presidential deniability had been extended by interpretation, custom and usage to cover all sensitive intelligence activities. Moreover, the minutes of the President's Foreign Intelligence Advisory Board contain expressions of concern covering the relevant period from 1956 onward. For example, the minutes contain such phrases as "the President's shield," and "need to protect the President against public identification with . . . covert activities or intelligence activities," and "for security reasons, every effort would be made to leave no papers with the President."

In 1955 responsibility for the East Coast Project was given to the Counterintelligence (CI) Staff of the CIA. An outline of the funding, staffing and other logistical needs of the East Coast Project noted that foreign espionage agents relied upon the United States policy of respecting the sanctity of the mails and that these agents used the mails for espionage purposes to the detriment of the United States. It noted that, although the project did not contemplate censorship, discreet monitoring (opening) would be conducted and that under CI staff management "more letters will be opened."

In 1958 the FBI was advised of the existence and extent of the CIA's East Coast mail project, and the CIA offered to share the project's "take" with the FBI. FBI Director Hoover gave his approval, and the FBI provided the CIA with the names and categories of persons or organizations in which it had an espionage or counterespionage interest. Such lists were used as additional guides by the CIA in making selections from the United States-Soviet mail that passed through the CIA checkpoint.

On February 15, 1961, following the election of President Kennedy, DCI Allen Dulles, Deputy Director of Plans Richard Helms, and another CIA officer met with newly appointed Postmaster General J. Edward Day. According to Mr. Day's recollection, Dulles said he came to tell him of "something secret" regarding the CIA and the mails. Exactly what Day was told is not clear. A contemporaneous CIA memorandum of the 1961 meeting strongly suggests that Day was told by Dulles of mail openings being made by the CIA. On the other hand, in 1975 Day averred that, while his memory of the 1961 meeting might be faulty, he recalled that Dulles offered to tell him of a secret CIA mail operation but that he (Day) declined the invitation to be briefed. Day, however, remains uncertain. Three months later DCI Dulles approved continuation of the project on the basis of its value to the intelligence operations of the CIA.

The Department's investigation has not definitively established whether Presidents Kennedy and Johnson were aware of the East Coast Project. President Eisenhower authorized Allen Dulles to brief President-elect Kennedy on all significant intelligence operations conducted by the CIA and other intelligence agencies. President-elect Kennedy met with Mr. Dulles on several occasions during and after the transition period to discuss such operations, but the Department has not been able to determine whether the East Coast Project was covered during the briefings.

In 1965, prompted by hearings held by Senator Edward V. Long concerning possible legislation to abolish mail covers by federal agencies, a high CIA official learned that President Johnson apparently had not been briefed on the East Coast Project and "gave instructions that steps should be taken to arrange to pass (information concerning the project) through McGeorge Bundy to the President after the (Long) Subcommittee has completed its investigation." Mr. Bundy does not recall being informed of the East Coast Project, and no documentary record that indicates such instructions were carried out has been found. Richard Helms testified that he believes he may have advised President Johnson of the East Coast project in the spring of 1967 at a meeting during which the President requested information concerning sensitive CIA operations. Again, no direct evidence corroborating or refuting Mr. Helms' statements has been located.

Interviews with former high level officials within the Kennedy and Johnson Administrations, however, disclose that Presidents Kennedy and Johnson were briefed on a regular basis by CIA officials about sensitive CIA operations. One former Cabinet official in both the Kennedy and Johnson Administrations stated that he was aware that mail openings were being conducted in the United States, although he did not know details of particular projects or their scope. The Cabinet officer stated that he believed Presidents Kennedy and Johnson were generally aware that the CIA was engaging in operations similar to the East Coast Project.

Interviews of individuals who served as members of the President's Foreign Intelligence Advisory Board (PFIAB) during the Kennedy and Johnson Administrations indicate that these individuals were aware of domestic mail openings by the CIA and FBI. PFIAB had the responsibility to review and assess the activities of the CIA and other agencies with foreign intelligence responsibilities and to advise the President on such matters. One PFIAB member, who served until 1968, stated that the PFIAB gave detailed briefings to the President; moreover, he stated his belief that the President would "have to be in a fog" to be unaware of the fact that techniques such as mail openings were being used. Again, however, the practice of "plausible deniability" was frequently raised by

persons knowledgeable of government intelligence practices as a possible explanation for the absence of any written records of presidential knowledge or authorization for the East Coast Project.

With the inception of Operation CHAOS, designed to determine the extent of hostile foreign influence on domestic unrest, the East Coast Project assumed a new intelligence-related purpose. In addition to Operations CHAOS, the project sought to develop positive foreign intelligence, such as information on Soviet crop and living conditions and population movements. Moreover, operational support intelligence was sought such as information on the postal censorship and secret writing techniques of the USSR, and there was a counter-intelligence purpose to assist the United States in meeting and neutralizing Soviet intelligence activities.

In July 1969 the CIA Inspector General's staff examined the East Coast Project and recommended that, although President Eisenhower apparently had authorized the project, if the CIA were to continue to administer the project, senior officials within the Nixon Administration should be briefed.

In 1969 William Cotter, a former CIA employee aware of the East Coast Project, was appointed Chief Postal

Inspector. Concerned that other top level postal officials were unaware of the project, in 1970 Cotter informed the CIA that either the Postmaster General would have to be apprised of the East Coast Project or it would have to be discontinued. Cotter pressed his request in January 1971. This caused a reevaluation of the merits of the East Coast Project. A CIA memorandum dated March 29, 1971, strongly urged continuation of the project, describing it as "an irreplaceable tool for the exercise of the Agency's counterintelligence responsibility." The memorandum noted that the counterintelligence information developed by the project was also of assistance to "the White House, the Attorney General and the FBI."

The CIA's senior officials decided to continue the project. In June 1971, to meet Cotter's concerns, Director of Central Intelligence Helms separately briefed both Attorney General John Mitchell and Postmaster General Winton Blount. There is dispute as to what the briefings encompassed. A contemporaneous CIA memorandum indicates that Mitchell and Blount were informed of the East Coast Project and agreed to its continuation; Helms testified before the Rockefeller Commission that he informed them fully

about the nature and scope of the mail opening project. Mitchell and Blount, though they acknowledge that there may have been a general discussion of mail covers, state that they were not informed about the opening of mail.

Former President Nixon has stated that he was aware of the CIA's monitoring of mail between the United States and the Soviet Union and the Peoples' Republic of China, but he disclaims any knowledge of mail openings, and the Department has uncovered no direct evidence which suggests that former President Nixon was ever specifically informed of the mail opening projects. It appears, however, that during the Nixon Administration the White House was receiving intelligence reports that enabled White House officials to determine that mail was being opened. John D. Ehrlichman, a White House official in the Nixon Administration, testified before the Senate Select Committee that, from his reading of intelligence reports, he was able to determine that mail was being intercepted, presumably by the CIA.

With the resignations of Postmaster General Blount in 1971 and Attorney General Mitchell in 1972, Chief Inspector Cotter again believed himself to be the only

senior government official outside the CIA and FBI with knowledge of the East Coast Project. He again informed CIA officials that, unless higher level approval for the project was obtained by February 15, 1973, he would withdraw the Postal Service's cooperation. James Schlesinger, who had succeeded Helms as DCI, decided that the foreign intelligence and counterintelligence information derived from the project did not outweigh the risk of embarrassment and potential public repercussions presented by its continuation. On February 15, 1973, the East Coast Project was suspended and, in effect, terminated.

Whether the failure of the Department's investigation to uncover any direct evidence, written or oral, of presidential knowledge or authorization was caused by the nonexistence of such knowledge or authorization, by confusion of mail openings with "mail covers," which were generally viewed as legitimate, or by the passage of time and the "presidential deniability" concept discussed above, cannot be determined. However, on the existing record, the government could not prove in a criminal prosecution beyond a reasonable doubt that the East Coast Project was conducted without presidential approval or without presidential knowledge and acquiescence.

B. West Coast Project

The West Coast Project was proposed in 1969 by CIA officials within the CIA's Plans Directorate for the purpose of obtaining foreign intelligence concerning the Peoples' Republic of China. The CIA was particularly interested in censorship techniques used by the Peoples' Republic of China, and the project was intended to evaluate such techniques through a survey of mail entering the United States from the Peoples' Republic of China. Initially, it was contemplated that the project would entail only the inspection of envelope exteriors. Approval of the project by postal officials was secured for a survey of envelope exteriors.

The West Coast Project, conducted in or near San Francisco, involved four separate surveys of mail between 1969 and 1971. The first survey took place in September, 1969 and lasted five days. Approximately 1,600 envelopes of incoming mail were screened during this period. No mail was opened in this initial survey, which apparently was undertaken without approval by top level CIA officials. The lower level officials responsible at that time for the project deemed this initial survey successful and concluded

that a broader scale survey of mail should be undertaken in order to evaluate Chinese intelligence techniques. During 1970 and 1971, three additional surveys were conducted by CIA officials in San Francisco, each lasting two or three weeks. In each of these surveys, only incoming mail from the Peoples' Republic of China was opened, apparently without the knowledge of the postal officials who cooperated by providing CIA officers with access to the mail. Approximately 550 pieces of mail were opened by the CIA during the course of the project. After the project's 1971 phase, no further West Coast operations were undertaken.

II. GROUNDS FOR PROSECUTION, POSSIBLE DEFENSES, AND EQUITABLE CONSIDERATIONS

A. Grounds for prosecution.

The Department of Justice has considered two statutory bases for prosecution of persons who participated in the East Coast Project. The first, 18 U.S.C. § 1702, prohibits the unauthorized opening or obstruction of mail in United States postal channels; the second, 18 U.S.C. § 241, proscribes conspiracies to deprive United States citizens of rights guaranteed by the Constitution. Under the general conspiracy statute, 18 U.S.C. § 371, liability would extend to persons who agreed to take part in violations of sections 241 or 1702, whether by opening the mails, by approving the openings, or by acting in concert with others who opened the mails.

A prosecution under section 241 requires proof of a violation of rights conferred on American citizens by the Constitution or laws of the United States; with regard to the mail openings, the prosecution would be premised upon a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. A prosecution cannot be maintained under section 241, however, unless it can be established that the defendants acted, or agreed to act, with the purpose of invading rights or interests protected by

the Constitution or by federal laws and that, at the time the defendants acted, protection of the right or interest violated had been "made definite by decision or other rule of law."^{6/} Weaknesses in the evidence and the difficulty of establishing the absence of presidential authorization suggest that the Department would not be able to meet the burden of establishing, beyond a reasonable doubt, that the defendants acted with the "specific intent" required by section 241 as interpreted by the Supreme Court. Moreover, it is doubtful that, at the time the defendants acted, the Fourth Amendment forbade their actions with sufficient clarity to be "definite;" between 1953 and 1973 there was substantial evolution of Fourth Amendment law, as discussed later in this Report.

In a prosecution under section 1702 the Department would not be confronted with similar difficulties. All that is required to establish a prima facie violation of section 1702 is a showing that (a) the defendant opened mail in postal channels with "design to obstruct the correspondence, or to pry into the business or secrets of another" and (b) the defendant lacked lawful authority to do so.

^{6/} See Screws v. United States, 325 U.S. 91 (1945). See also United States v. Price, 383 U.S. 787, 806 n. 20 (1966); Anderson v. United States, 417 U.S. 211 (1974).

Whether the openings of mail in the present case violated section 1702 depends upon two related points:

First, was authorization, from a person empowered to give such authorization, obtained for the East Coast Project?^{7/}

Second, if some authorization was obtained, was it effective? Resolution of the latter question requires a consideration of whether the Fourth Amendment to the Constitution permits officials of the Executive Branch to authorize the opening and reading of international mail and, if so, under what conditions and by what means. We turn to a consideration of those problems.

B. The requirement of lawful authorization.

Some courts have treated section 1702 as a specific intent statute, which would make prosecution overwhelmingly difficult. The Department of Justice believes, however, that a better view of the law is taken by the courts, which have treated it as a "general intent" statute, providing that persons shall not open envelopes moving through the mails. Its prohibition does not, however, extend to openings that have been lawfully authorized. Thus, other statutes (see, e.g., 19 U.S.C. §482) authorize the opening of envelopes under specified circumstances, and acting under its general powers the Postal Service

^{7/} Since no statute authorizes the CIA to intercept or open mail in United States postal channels, legal authority for the East Coast Project could be derived only from powers granted to the President by Article II of the Constitution and delegated by him to the CIA or others.

itself opens envelopes when necessary to ascertain the address of the intended recipient. Indeed, unless there were an "authorized opening" exception, a law enforcement official who opened mail pursuant to a judicial warrant would violate the statute.^{8/} See United States v. Van Leeuwen, 397 U.S. 249 (1970). The Department of Justice consequently believes that the actions of the CIA in opening mail also would not violate section 1702, if those actions were properly authorized.^{9/}

^{8/} An 1882 decision interpreting a statutory predecessor to section 1702 stated that "one is punishable who wrongfully, without any authority of law, or pretence of authority," interferes with the mail. United States v. McCready, 11 Fed. 225, 236 (W.D. Tenn. 1882).

^{9/} Neither section 1702 nor any other statute purports to take from the President, and the Executive Branch in general, any preexisting power to open and examine mail when necessary to the discharge of the President's constitutional responsibility for foreign affairs. Cf. United States v. Butenko, 494 F.2d. 593 (3rd Circ.) (en banc), certiorari denied, 419 U.S. 881 (1974), which holds that an analogous statute, although containing a broadly stated prohibition, does not affect presidential power to authorize surveillance when the Constitution otherwise permits it.

One other statute, 39 U.S.C. §3623(d), might be considered to do so. That statute forbids the opening of domestic first-class mail without a warrant. Nothing in the legislative history of section 3623(d) indicates that it was designed to affect the power of the President concerning foreign affairs. See, e.g., H.R. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess. 88 (1970). Although section 3623(d) originated in the Espionage Act of 1917, 40 Stat. 230, it then contained only a statement that the Act did not affirmatively authorize the opening of mail. Moreover, it applies only to letters of "domestic origin," and so would not affect the opening of mail entering the United States from abroad. Finally, (continued on following page)

9/ Footnote continued from previous page.
section 3623(d) does not refer to section 1702 and does not provide criminal penalties for opening mail without a warrant. Nothing in the legislative history of the enactment of section 3623(d) indicates that Congress believed that it was altering the elements of 18 U.S.C. §1702.

It would have been extraordinary for the Congress without discussion to have enacted a restriction upon the President's foreign intelligence surveillance power so obliquely when, in 1968, legislating with respect to the much greater invasion of privacy constituted by wiretapping, it carefully disclaimed any intent to affect this area -- partly in response to the concern that it might have no power to do so. See 18 U.S.C. §2511(3), which is discussed at length in the Keith case. The Department has not heretofore taken that view of the statute, and to do so for the first time in connection with the present prosecution would -- in addition to reaching only post-1970 activities -- raise the difficulties concerning fairness, the defense of mistake of law, and jury reaction discussed below in connection with newly imposed requirements regarding the character of presidential authorization.

The Department does not wish, however, to make a final determination concerning the future interpretation it will accord section 3623(d) in the distorting context of the present proceeding, where any position other than that set forth above would have the flavor of retroactive legislation. If in the future any mail opening, based on express, properly limited Presidential authority, is contemplated, we would regard as a necessary preliminary step to assure its lawfulness the issuance of an advisory opinion by the Attorney General concerning the effect of section 3623(d) upon section 1702.

We think it clear that the prosecution could not establish beyond a reasonable doubt, as it would be required to do, that the East Coast Project was not authorized by the President, or by someone entitled to act for the President. The effect this would have on the legality of the mail opening program has changed considerably over the last 20 years; the authorization (which the court would be required to assume if the prosecution could not prove lack of authorization beyond a reasonable doubt) may have been sufficient at the outset to satisfy the requirements of the Fourth Amendment, but the understanding of the requirements of that Amendment has not remained constant.

The CIA mail opening program was initiated and took shape during the 1950s. Later operations were a continuation of this program with changes in emphasis. During the 1950s, and well into the 1970s, the law concerning clandestine surveillance was quite different, and the requirement of prior judicial authorization was different. Indeed, until 1967 respected scholars argued that the judiciary was the wrong branch of government to make authorization decisions concerning any clandestine surveillance; until 1972 courts held that prior judicial scrutiny was unnecessary when the surveillance involved national security; and at the present

time the case law indicates that prior judicial scrutiny is not necessary when surveillance of foreign powers or their agents is involved.

The Supreme Court indicated long ago ^{10/} that sealed domestic mail may not be opened in the absence of a search warrant. This ruling was based upon the expectation of privacy enjoyed with respect to the contents of first-class mail; that privacy was guaranteed by statute, and courts held that other classes of mail could be opened without judicial authorization. Those who send or receive mail crossing the border of the United States do not enjoy the same expectation of privacy as those sending or receiving domestic first-class mail. Customs Service officers are permitted by law to open all envelopes for necessary inspections. ^{11/} There may also be other reasons why international and domestic mail should be treated differently.

^{10/} Ex parte Jackson, 96 U.S. 727 (1877).

^{11/} 19 U.S.C. §482.

The expectation of privacy in the contents of international mail therefore cannot easily be equated to the expectation of privacy in domestic mail.

No cases have dealt with the surreptitious opening of international mail to gather foreign intelligence or counterintelligence information, but there is a close analogy in the interception of wire communications. In neither case is property taken; in neither case is a person delayed or physically inconvenienced. But in both cases private communications are intercepted, and the constitutional question becomes whether this intrusion must be authorized in advance in a specified way.

The Supreme Court's first constitutional decision concerning wire interceptions was Olmstead v. United States, 277 U.S. 438, which was handed down in 1928. Olmstead held that telephone conversations could be overheard without prior judicial approval. The Court set out two major rationales for its holding; first, that the interception of wire communications does not "seize" anything within the meaning of the Fourth Amendment because there is no physical trespass and it does not prevent the parties from conversing; second, that the Fourth Amendment does not reach beyond the home or office to the whole world into which communications may be sent. Under the standards of Olmstead, which was the law when the CIA

mail opening programs began, there was apparently no constitutional need for judicial approval of a program of covert openings of international mail, so long as the mail was resealed and sent on to its destination without censorship.

The law established by Olmstead did not begin to change until 1961, when the Supreme Court decided in Silverman v. United States 365 U.S. 505, that the Fourth Amendment applied to a listening device or "bug" placed by physical trespass in the wall of an office, even though the device did not prevent conversations from taking place. Silverman, however, left the remainder of the Olmstead analysis untouched.

During these years there also were serious questions whether the judiciary was empowered under Article III of the Constitution to issue surveillance orders. Respected scholars^{12/} and at least one Justice of the Supreme Court^{13/} argued that surveillance orders issued ex parte were not part of a "case or controversy" if they were not part of a criminal prosecution, and so judges lacked power to issue them. They argued, as well, that surveillance orders could

^{12/} See, e.g., Telford Taylor, Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance 77-93 (1969).

^{13/} Osborn v. United States, 385 U.S. 323, 353 (1966) (Douglas J., concurring).

not be classified as "warrants" under the Fourth Amendment because they were not designed to seize identifiable things and were not "returned" to the issuing judge in the historical fashion. Other objections, too, were raised. Resort to the judiciary, it was said, would diffuse responsibility and accountability for surveillance; responsible executive officials should authorize surveillance when necessary, and the Constitution would not forbid this practice.^{14/}

In 1967, in Katz v. United States, 389 U.S. 347, the Supreme Court both overruled Olmstead and indicated that judges were empowered to issue surveillance orders in criminal cases. Katz held that the Fourth Amendment protects people, not places, and that law enforcement officers ordinarily must obtain advance judicial approval before intercepting communications in which there is a legitimate expectation of privacy.

Katz, however, did not resolve the question of whether a judicial warrant was available in non-criminal cases or whether it was necessary when national security was involved. The Supreme Court did not speak to the latter question until June 19, 1972, when it decided United States v. United States District Court (Keith), 407 U.S. 297. The United States argued in that

^{14/} See, e.g., Taylor, supra, at 90.

case that the requirement of prior judicial approval should not apply to surveillance carried out to gather information about domestic security and foreign intelligence -- an argument which would, of course, support the propriety of the CIA mail opening programs as well as of wire interceptions for that purpose. The Supreme Court rejected part of the argument and held that a warrant is required for electronic surveillance in domestic security investigations. The Court made it clear, however, that it was setting aside a lengthy history of contrary practice,^{15/} and that it was reserving for decision in the future all questions concerning the procedures required to be used to gather foreign intelligence.^{16/}

The East Coast Project ended eight months after Keith was decided. Keith affected the propriety of warrantless foreign intelligence surveillance, but it did not decide it. Those courts which have decided the issue have upheld such warrantless surveillance, and the Department of Justice has consistently taken the position in the courts, before congressional committees, and in public statements that the President or the Attorney General may authorize limited electronic surveillance of foreign powers or their agents for foreign intelligence

^{15/} 407 U.S. at 299, 310-311.

^{16/} 407 U.S. at 308-309, 321-322.

purposes.^{17/} The CIA mail opening program was not authorized with the care and clarity that current practices and, we believe, the Constitution now require. But these principles have evolved so rapidly during the last two decades that they would have sounded strange to those who initiated the program during the 1950s and continued it during the 1960s.

A retroactive application of newly enunciated Fourth Amendment principles to persons whose conduct took place before the principles were established could, of course, not deter like conduct; and it would be unfair to punish federal employees for doing things which, as the law then appeared, were not illegal. The Supreme Court has held that changes in Fourth Amendment law should not apply retroactively. United States v. Peltier, 422 U.S. 531 (1975). That principle surely applies to criminal prosecutions against those who may have transgressed the Fourth Amendment no less than it does to the application of the exclusionary rule, which was at issue in Peltier.^{18/}

^{17/} Compare United States v. Brown, 484 F.2d 418 (5th Cir. 1973), certiorari denied, 415 U.S. 960 (1974); and United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), certiorari denied, 419 U.S. 881 (1974); with Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), certiorari denied, 425 U.S. 944 (1976).

^{18/} See also Wood v. Strickland, 420 U.S. 308, 321 (1975), which holds that certain executive officials are liable in damages for a violation of constitutional rights only if they act in "ignorance or disregard of settled, indisputable law"

The role of authorization and its legality also is affected by changes in the law of border searches. It has long been accepted that things crossing the border are governed by special rules allowing search.^{19/} These constitutional rules do not allow the government to subject a person to legal disabilities on account of his lawful communications,^{20/} but they allow federal officers to open the mail without warrants to look for contraband and dutiable items, including pornography.^{21/} These rules may affect the expectation of privacy surrounding international correspondence. Moreover, the international exchange of ideas, especially with citizens of potentially unfriendly powers, may be on a different footing from the domestic exchange of ideas.^{22/}

19/ See Cotzhausen v. Nazro, 107 U.S. 215 (1882); California Bankers Ass'n v. Shultz, 416 U.S. 21, 62-63 (1974).

20/ Lamont v. Postmaster General, 381 U.S. 301 (1965).

21/ United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. 12 200 ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973).

22/ Kleindienst v. Mandel, 408 U.S. 753 (1972).

Until 1973 it was widely thought that the border search rules allowed the inland search of persons and vehicles near the border for contraband and dutiable items.^{23/} The large majority of courts uphold the legality of opening envelopes at the border. Six courts of appeals have held that Customs officers may open envelopes without probable cause or search warrants to search for contraband, although one court of appeals has held to the contrary. The Supreme Court may resolve the dispute in the coming months.^{24/} The scope of the "border search" exception to the warrant clause of the Fourth Amendment would certainly bear upon the legality of any authorization to inspect international mail.

The discussion so far has traced changes in the law, during and after the time of the mail openings by the CIA, that would affect the lawfulness of a properly authorized surveillance. The law also has evolved in recent years concerning the form an authorization must take and the restrictions that must be observed in exercising any authority delegated to approve the activities. Questions regarding the necessity for express delegations by the President of his constitutional authority and for periodic reexamination of

^{23/} Almeida-Sanchez v. United States, 413 U.S. 266. The extent to which Almeida-Sanchez altered existing law is discussed in United States v. Peltier, supra, 422 U.S. at 539-542.

^{24/} United States v. Ramsey, certiorari granted October 4, 1976, No. 76-167.

the activities in light of the need for the information and the intrusiveness of the techniques employed have only recently been addressed. These questions arise, in this case, because the presidential authorization for the East Coast Project -- if there was such authorization -- may have been presumptive rather than express; that is, it may have been in accord with the well-established principle applied in other areas of the law that agency heads are deemed to have been delegated those inherent presidential powers necessary to meet the responsibilities of the agency. Moreover, the approval for the openings was not limited in time, and responsible officials apparently did not reexamine the program on a regular basis to determine whether it should be continued.

Although the President may, consistent with the Constitution, authorize certain forms of surveillance to gather foreign intelligence information without seeking prior approval from the Judicial Branch, the Department believes that the evolving law in this area requires such authorization to be express. The executive official to whom the power to approve such surveillance has been delegated must take steps to assure himself that the surveillance is reasonable under Fourth Amendment standards.

He must consider the nature of the surveillance and the need for the information sought in determining whether to approve the activity, and then he must periodically reexamine the activity to ensure that it continues to meet constitutional standards. In urging the courts to accept executive authorizations of surveillance, the Department has argued that in each instance the personal approval of the President or his delegate, such as the Attorney General, would be employed to ensure the degree of consideration and control necessary under the Fourth Amendment.^{25/} Mr. Justice White, concurring in Katz, indicated that he would accept such executive approval of surveillance, but only if it was explicitly considered by responsible officials and properly delimited.^{26/}

It was only recently, in United States v. Ehrlichman, that a court of appeals concluded that a warrantless foreign intelligence search may be authorized only by the President or Attorney General personally, and that the authorization must

^{25/} See, e.g. the Brief for the United States in the Keith case.

^{26/} 389 U.S. at 364. See also the opinions in United States v. Brown, supra, and United States v. Butenko, supra.

meet standards of consideration and limitation similar to those the Judicial Branch would impose on itself. 27/

The law we have described is of recent vintage. As was pointed out earlier, it was far from clear until 1967 that the judiciary would become involved in issuing warrants for surveillance even in criminal cases. Not until after Katz did courts begin to consider and delineate the requirements of specificity, personal responsibility, and limited duration that today limit the exercise of Executive Branch powers. It seems fair to conclude that, at the time the East Coast Project began, it was assumed that the President could, without issuing explicit delegations of power, allow others to speak for him in this field. So far as the CIA was concerned, the words of anyone who appeared to be authorized to speak for the President had the same legal effect as the President's own words.

27/ No. 74-1882, D.C. Cir., decided May 17, 1976, slip op. 31. Ehrlichman involved an inexplicit mandate which gave a general instruction to accomplish a particular end but did not discuss the means or techniques to be used to reach that end. Unlike the Ehrlichman case, there was an aura of presidential authority permeating the mail opening program for the two decades in which the technique was used. In addition, the program was not carried out, as the physical search was in Ehrlichman, by "an amorphous, ad hoc unit with no tradition of public service and no clear lines of responsibility," slip op. at 30, but by the unit of government established by Congress for the conduct of foreign intelligence operations.

Although President Eisenhower passed upon many foreign intelligence projects himself, he allowed Allen Dulles to speak for him on others, and CIA personnel may reasonably have assumed that Dulles did so with regard to the East Coast Project. Presidents Kennedy and Johnson often spoke through their subordinates -- or at least appeared to do so in order to maintain "plausible deniability." Any CIA personnel who discussed the matter with Attorney General Mitchell might reasonably have assumed that President Nixon acted in this respect through the Attorney General. Until various courts rendered several decisions within the past year, there was little or no indication from the judiciary that Presidents (or their surrogates) were required to act through explicit, time-limited orders; 28/ the entire concept of "plausible deniability" taught the opposite.

28/ Indeed, even as late as 1976 the courts seemed to accept an implied authority in the Attorney General without a written delegation of authority from the President. Ehrlichman, supra.

C. The Defense of Mistake.

Suppose, however, that it were concluded that present Fourth Amendment standards equitably could be applied to the East Coast Project, and that under those standards the authorizations -- if any there were -- would be insufficient to justify the lengthy and deeply intrusive program that was actually carried out. The trial court, and the jury, then would be required to determine whether the defendants made a mistake, either of fact or of law, sufficient to make them not culpable for violation of 18 U.S.C. §1702.

Mistake of fact generally is recognized as a defense in criminal cases; mistake of law is not. The present case would present both kinds of defenses -- mistake of fact to the extent the defendants reasonably believed there was presidential authorization for the East Coast Project, if in fact there was none; and mistake of law to the extent the defendants reasonably believed that the authorization was legally sufficient, if in law it was not.

The mistake of fact defense might not have to be raised by the defendants, since under the circumstances of this case the prosecution would have difficulty establishing that no authorization in fact existed. Because of the age of the evidence, the deaths of important participants in the events and the striving for "plausible deniability" that led to an absence of written records, the prosecution would be unable to prove

beyond a reasonable doubt that there was no presidential authorization for the East Coast Project. It would therefore, for practical purposes, have to concede that the mail openings were authorized and to argue that the authorization was ineffective. This would make it unnecessary for the defendants to raise a mistake of fact defense; the prosecution simply could not prove beyond a reasonable doubt that there was no authorization.

This would then lead to the assertion of a mistake of law defense. Mistake of law generally is recognized as a defense in criminal prosecutions only when a law or an authoritative legal decision or interpretation misled the defendant reasonably to believe that his conduct was lawful.^{29/} Criminal convictions in such circumstances would impose criminal sanctions for conduct which the defendant could not reasonably have known was unlawful.^{30/} In any potential mail opening prosecution, however, the normal foundation for the defense would not be present. No statute or judicial decision ever affirmatively established or announced that the mail opening projects, or conduct closely analogous to them, were lawful, and Attorney General Mitchell's possible approval of the projects lacked any indicia of a formal considered opinion

^{29/} See Model Penal Code §2.04(3)(b) (P.O.D. 1962).

^{30/} Cf. Bouie v. City of Columbia, 378 U.S. 347 (1964); Brief for the United States in Marks v. United States, No. 75-708, argued in the Supreme Court, November 1 and 2, 1976.

of law that the defense normally would require.

Notwithstanding this, the Department believes that the circumstances of the case could very well induce a trial court to instruct the jury on a mistake of law defense broader than that generally recognized, perhaps on the ground that a reasonable belief in lawful authority would negate the intent that section 1702 requires.^{31/} Indeed, in the recent decision of the District of Columbia Circuit Court in the Barker and Martinez case, the prevailing opinions of two judges concluded that expansive variants of the defense properly were available to defendants who, as private citizens, had assisted a White House official in what purported to be a national security search. Judge Wilkey concluded that the defense properly would

^{31/} Certain staff documents prepared in the CIA at several points in the East Coast Project's operation expressed the view that, under generally applicable domestic statutes, mail opening was unlawful. These documents, however, were not prepared by attorneys; they were not, in any sense, considered legal judgments; they did not conclude that, because of unlawfulness, the project should be terminated. To the contrary, their point appears to have been that the apparent unlawfulness would seriously embarrass the Agency if the program were exposed, perhaps especially because the true purpose and authorization of the project could not be exposed in justification. The Department accordingly does not believe it likely that such documents can be taken as indicating that the defendants subjectively were aware that the project was legally unjustified, or refute their probable defense that they believed it proper in the exercise of presidential power, supervening generally applicable law, to protect the national security.

apply if the defendants could show facts justifying their reasonable reliance on the White House official's apparent authority and a legal theory justifying their belief that the apparent authority was lawful. Judge Merhige concluded that a defense would be available if the defendants reasonably relied on an apparent interpretation of lawful authority by the White House official.

Even if the trial court did not choose to give an expansive mistake of law instruction, the Department believes that considerations of fairness would lead the judge to allow the introduction of evidence bearing on the defendants' motives and the circumstances in which they acted -- evidence which would, in the Department's view, critically influence the jury's judgment.

D. Problems of Proof.

Even if the prosecution could overcome the argument that the East Coast Project was adequately authorized, and even if it could successfully meet the defense of mistake, it still would not follow that the prosecution would be successful. The prosecution must prove its entire case beyond a reasonable doubt. Once a defense going to any of the elements of the offense has been raised, the prosecution must respond by negating that defense beyond a reasonable doubt.^{32/}

^{32/} See Mullaney v. Wilbur, 421 U.S. 684 (1975).

Problems of proof are difficult whenever the prosecution seeks to prove a crime that took place long ago. Statutes of limitations -- which for most federal crimes are five years -- are designed to alleviate these problems by creating a policy of repose for offenses not prosecuted within a few years of their commission.^{33/} Although the statute of limitations applicable to 18 U.S.C. §§1702 and 371 would allow a conspiracy prosecution for the entire East Coast Project so long as any overt act of the conspiracy (such as the opening of any envelope) were committed within five years of the date of the filing of the indictment, the technical permissibility of a prosecution could not overcome the enormous problems of proof entailed in establishing, beyond a reasonable doubt, criminal culpability for events that took place as long ago as 1953.

The clearest illustration of the difficulty in mounting a successful prosecution is the deaths of persons who were major participants in the events. Presidents Eisenhower, Kennedy and Johnson are dead; they cannot disclose what they knew of the East Coast Project or what they may have authorized. Allen Dulles, J. Edgar Hoover, Postmasters General, several directors of the operating divisions of the CIA -- all of them persons who may have given, sought, or obtained authorization, or controlled the scope or duration of the mail openings -- are dead.

^{33/} See generally the Brief for the United States in United States v. Lovasco, certiorari granted October 12, 1976, No. 75-1844.

If documentary evidence reliably establishing authorization or lack of authorization existed, or if documentary evidence establishing personal responsibility for the scope or duration of the East Coast Project could be found, it might be possible to prosecute successfully despite the deaths of important persons. But the concept of "plausible deniability" led the principals to act without making a "paper trail" that could be used to reconstruct their acts. The absence of documentary evidence was intended to frustrate enemies or potential enemies and to protect Presidents; in practice, at least in this case, it also has the effect of frustrating the Department's ability to prove critical facts beyond a reasonable doubt in court. Whatever use this practice may have had, the understanding of the present state of the law articulated here by the Department of Justice requires that it be eliminated for reasons discussed in part III below.

The gaps and ambiguities in the evidence available in 1977 also would make it difficult to overcome a defense of mistaken reliance on what appeared to be proper authorization. In 1953, when the East Coast Project was begun, and for at least a substantial portion of the period of its operation, there was an acute consciousness on the part of the public and the government alike that serious foreign threats -- of both overt aggression

and covert subversion -- required extraordinary vigilance. There was widespread, if unjustified, belief that opposition to government policies, occasionally expressed violently, was generated, encouraged or supported by potentially hostile foreign powers. These concerns unquestionably affected perceptions of the government and of presidential power to respond by using covert activities. These attitudes were reflected in the men who authorized and conducted the mail openings program. The reasonableness of their attitudes would influence, in substantial part, the reasonableness of their beliefs that they were entitled to act as they did. A trial of this case therefore would open a searching inquiry into the perceptions of a generation of Americans; it would be, as Professor Wechsler put it during the course of his consultation with the Department, to "indict an era" and would raise fundamental jurisprudential questions concerning the application and use of the criminal law.

The defendants in any mail openings prosecution would be able to present circumstantial evidence to indicate that Director Allen Dulles secured President Eisenhower's approval for the East Coast program; at least, the potential defendants reasonably could have believed and apparently did believe, that he had. The potential defendants, in any event, continued a program already begun -- a program that, by the time Richard Helms became Director of Central Intelligence, had acquired a

bureaucratic momentum of its own. The Agency's highest officials could have had every reason to suppose that, within the government itself, the program was thought fully consistent with the government's purposes, responsibilities, and powers. Potential defendants could reasonably have believed that Presidents succeeding President Eisenhower, and other high officials of the government's intelligence establishment during this later period, knew at least in a general way of the fact that mail openings were taking place and, in a general way, acquiesced in the practice. Furthermore, certain senior officials of both the Kennedy and Johnson Administrations have stated to the Department that, although they knew neither their nature nor their scope, they personally were aware of the existence of mail openings and were convinced that the Presidents under whom they served must have known as well. In light of such evidence, the Department almost certainly would encounter the gravest difficulties in proving guilt beyond a reasonable doubt.

The weaknesses of the evidence, combined with the changes in the law during the course of the East Coast Project, make it unlikely that a prosecution could succeed. An unsuccessful prosecution in a case of this nature would be most undesirable.

It would not establish standards to guide future conduct; to the contrary, an acquittal might be perceived, rightly or wrongly, as an indication that programs such as the East Coast Project are not now illegal -- an indication that the Department of Justice believes would be most unfortunate. Moreover, either the trial judge or an appellate court, sensing the equities of the case and the possibility that the defendants may have labored under an erroneous, albeit reasonable, belief that they were entitled to act as they did, might expand the availability of a "mistake of law" defense more than the Department believes is warranted. A prosecution in this case would present the courts with the sort of hard facts that lead to bad law.

Even to institute a prosecution and to win it might be unfair. If the potential defendants in fact had a reasonable belief that they were acting pursuant to lawful presidential authorization, a prosecution many years later could appear to be a vindictive kind of second-guessing. All the worse to use the criminal sanction in hindsight against individuals when what we now see as wrong was not so much the malign conduct of individuals as a disturbing and dangerous policy of government. Bringing a criminal prosecution, especially when it would in all likelihood fail, is not the only nor even the best way to establish rules of conduct. The enunciation

of a clear interpretation of the Constitution and the criminal law that stands from this time forward as a barrier against such activity, whether by rogue individual officials or by the creation of an illegal policy, avoids the high risk of failure at trial but assures that the criminal law can justly be brought to bear on any further conduct of this sort.

III. THE DEPARTMENT BELIEVES THAT CONDUCT SIMILAR TO THE EAST COAST PROJECT TODAY WOULD BE CLEARLY ILLEGAL

This report has dealt so far with the problems in bringing and winning a prosecution for the CIA's mail interception program. The attention to the difficulties in the case should not obscure the most important of the Department's conclusions -- that any program similar to the East Coast Project, if carried out today or in the future, would violate the law. The Department therefore would not hesitate to prosecute any persons, whatever their office, who may become involved in such a program.

The East Coast Project arguably was authorized by Presidents and their delegates during a time when the Fourth Amendment was understood to be less rigorous in its requirements. Such a program conducted today could not meet the requirement of authorization.

With respect to the present situation, Executive Order 11905 withdrew any prior authorization for CIA mail opening programs. That order, issued February 18, 1976, prohibits the national security agencies covered by the order from "[o]pening of mail or examination of envelopes of mail in the United States postal channels except in accordance with applicable statutes and regulations." No statute or regulation authorizes the CIA to open or read mail.

More important, however, the Department of Justice believes that the President lacks the authority to authorize a program comparable to the East Coast Project whether or not Executive Order 11905 continues in effect. This is so for a number of reasons. As this report has discussed above, the Executive Branch may exercise its constitutional authority to engage in certain forms of surveillance without the prior approval of the Judicial Branch only if it determines whether the facts justify the surveillance, renders a formal, written authorization, and places a time limitation upon the surveillance. The authorizing officer must act pursuant to an express, written delegation of presidential authority. The East Coast Project, and anything similar to it, would not satisfy these standards: much of the program was unreasonably broad in scope, it was not explicitly authorized in writing, and it was not subjected to frequent reexamination to determine whether continuation was appropriate. The requirement of a formal, written authorization means that

the "plausible deniability" concept may never again be used as an excuse for lack of evidence of lawful authority.

The establishment of a program of surveillance could be justified only by the President's foreign affairs powers. But the existence of such powers does not validate every action taken in their name. There must in each case be a sufficient basis, measured in light of the private interests the surveillance invades, for believing that the surveillance is necessary to serve the important end that purportedly justifies it. It must, in other words, be reasonable in scope and duration, as "reasonable" has come to be defined by the courts in cases involving wiretapping. No open-ended authorization of the sort involved in the East Coast Project would be sufficient. The Department does not suggest that this means that there must be probable cause to believe that every letter sought to be opened under such an authority would contain foreign intelligence information, any more than there must be probable cause to believe that every telephone call that might be overheard during a wire interception for criminal investigative purposes will include a discussion of crime. But there must, at a minimum, be a determination that the facts justify the surveillance and that it is no more intrusive

than is necessary to that end.^{34/} The standards that guide presidential conduct and the conduct of the Department of Justice draw their substance from the evolving principles of Fourth Amendment jurisprudence. Under those standards the East Coast Project could not now lawfully be approved.^{35/}

^{34/} Cf. United States v. Martinez-Fuerte, 428 U.S._____,⁹⁶ S. Ct. 3074 (1976) (cars may be stopped without probable cause or a warrant for a brief scrutiny, so long as the overall program of stopping cars is reasonable and productive); Camara v. Municipal Court, 387 U.S. 523 (1967) (warrants to search houses may be obtained on probable cause to believe that a building code violation has occurred).

Building on this and similar Supreme Court analyses, the Administration proposed legislation to provide for the issuance of a judicial warrant authorizing the use of electronic surveillance in foreign intelligence and foreign counterintelligence cases. That legislation would have required proof of probable cause that the target of the surveillance was a foreign power or an agent of a foreign power and a submission of a certification signed by a high level executive official that the information sought was necessary to the foreign intelligence or foreign counterintelligence needs of the federal government. It also required the court's review of procedures to minimize the acquisition and retention of extraneous information.

^{35/} See United States v. Brown, *supra*; United States v. Butenko, *supra*; United States v. Ehrlichman, *supra*. On the constitutional standards for the approval of domestic wiretaps, see Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, *supra*; United States v. Kahn, 415 U.S. 143 (1974); United States v. Scott, 516 F.2d 751 (D.C. Cir. 1975); certiorari denied, 425 U.S. 917 (1976). Cf. United States v. Donovan, certiorari granted, 424 U.S. 907 (1976), argued October 13, 1976.

IV. CONCLUSION

The East Coast Project would now be illegal, and the Department would not hesitate to prosecute those who participated in such a program in the future. The applicable law has not always been so clear, however, so that a prosecution brought now for a course of conduct that spanned 1953 to 1973 might be unfair to defendants who believed that the program they were conducting began with presidential authorization and continued with this assumed authority. Finally, because of difficulties of proof that have been brought about by the lack of written documentation, the lapse of time, the fading of memories, and the deaths of key participants, the Department does not believe it could prove beyond a reasonable doubt that the potential defendants are criminally responsible for their participation in the mail opening program.

Questions of the legality of intelligence methods and of the scope and exercise of the national security power did not reach the courts until this decade. The preceding sections of this report have described the development, primarily in the last ten years, of Fourth Amendment law governing the use by the Executive Branch of surveillance that invades privacy, and the principles that the Department believes now govern its scope and exercise. But whatever can be said about the law now,

the Department believes at the time the potential defendants acted, there was a substantial basis for thinking that the law was otherwise. What would make the contemplated prosecution particularly unfair is the fact that ignorance of the developing law, and the consequent existence of erroneous assumptions of legality, were in large part the fault of the government, and indeed the Department of Justice itself. The Department's own attitudes toward mail openings as a means of gathering foreign intelligence must have appeared at least equivocal. Although after 1966 the FBI did not engage in mail opening, it participated in and was the primary beneficiary of the CIA's East Coast Project. On two occasions early in the 1960s the Department considered criminal prosecutions that would have been based in part on evidence derived from FBI mail openings. In each case the Department declined or withdrew prosecution. Whether it did so because it feared that the evidence would be excluded as illegally obtained, or whether it did so to avoid revealing the existence of the mail opening projects, the effect was the same: it allowed the programs to go on as before, and it did not instruct the FBI or the CIA to cease opening mail. What is more, in the mid-1960s, in connection with Senate subcommittee hearings on possible governmental monitoring of the mails, and again in the early 1970s,

the available evidence indicates that the then Attorneys General probably were informed generally of the CIA's activities and, in the latter instance, of their possible scope. Again, no steps were taken to determine what the programs encompassed or to question in any way their legality.

During the period in which the mail openings took place; there was no clear control to ensure that arguably valuable intelligence techniques would be employed only with careful attention to their legality and their effects on individual rights. The absence of defined control was perhaps in part the result of the necessary secrecy, even within the government, that attends intelligence operations, and of the desire for "plausible deniability" by the President. Whatever its cause, the failure of officials at the highest levels who were generally aware of these activities (though they did not participate in them) to clarify the law and establish institutional controls, and their apparent contentment to leave the individuals operating in this field to proceed according to their best estimates of legal constraints in a vague and yet vitally important area -- all this would render a prosecution by the government hypocritical. What really stands indicted as a result of the information which the Department's investigation has disclosed is the operation of the government as an institution specifically, its failure to provide adequate guidance to its

subordinate officials, almost consciously leaving them to "take their chances" in what was an extremely uncertain legal environment.

One of the purposes, if indeed not the primary purpose, of the criminal law is not merely to punish past wrongdoing but to prevent wrongdoing in the future. If the present prosecution were the only way, or even an effective way, of achieving that result, it might be considered desirable despite elements of unfairness and the almost certain lack of success in obtaining convictions. It is of course recognized that whether a conviction could be achieved only can be determined by the bringing of a prosecution. The failure to convict, however, would hinder the development of the standards that we believe the law now establishes. The Department believes that the objective of preventing repetition of such activity can better be achieved by other means.

Substantial institutional changes in order to assure adequate protection for individual rights in the conduct of intelligence operations have already been made. Executive Order 11905 clearly delineates the proper responsibilities of each of the intelligence agencies and establishes a detailed structure of oversight and approval which includes substantial

participation by the Attorney General. Moreover, this report itself, which is a departure from normal Department practices, is meant to serve the purpose of clearly and publicly describing the Department's view of the current law. It serves as guidance for all federal officials acting in this area, and as fair notice that any failure in the future to comply with these newly developed but now clearly enunciated standards will result in prosecution.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK



-----X
MARY RULE MACMILLEN,
Plaintiff:
v.
UNITED STATES,
Defendant.
-----X

Civil Action No.

77C 597

STIPULATION

The parties, through their undersigned attorneys,
hereby stipulate as follows:

1. The addressee of the envelope sent by plaintiff Mary Rule MacMillen was a prominent, well-known Soviet citizen and dissident who traveled outside the Soviet Union including, on occasion, to the United States.
2. The name of this addressee was on a watchlist prepared by the CIA and utilized by CIA employees in the selection of mail to be opened.

BURT NEWBORNE

Attorney for plaintiff
Mary Rule MacMillen

JOHN T. BOESE

Attorney for Defendant

DOMESTIC CIA AND FBI MAIL OPENING PROGRAMS

PART I: SUMMARY AND PRINCIPAL CONCLUSIONS

Between 1940 and 1973, two agencies of the federal government—the CIA and the FBI—covertly and illegally opened and photographed first class letter mail within the United States. These agencies conducted a total of twelve mail opening programs for lengths of time varying from three weeks to twenty-six years. In a single program alone, more than 215,000 communications were intercepted, opened, and photographed; the photographic copies of these letters, some dated as early as 1955, were indexed, filed, and are retained even today. Information from this and other mail opening programs—“sanitized” to disguise its true source—was disseminated within the federal establishment to other members of the intelligence community, the Attorney General, and to the President of the United States.

The stated objective of the CIA programs was the collection of foreign intelligence and counterintelligence information; that of the FBI programs was the collection of counterespionage information. In terms of their respective purposes, seven of the twelve mail opening programs were considered to have been successful by Agency and Bureau officials. One CIA project and three of the FBI programs concededly failed to obtain any significant relevant information. Another CIA operation—clearly the most massive of all the programs in terms of numbers of letters opened—was believed to have been of value to the Agency by some officials, but was criticized by many others as having produced only minimally useful foreign intelligence. Despite two unfavorable internal reviews, this program nonetheless continued unabated for twenty years.

While all of these programs responded to the felt intelligence needs of the CIA and the FBI during the “cold war” of the 1950’s and early 1960’s, once in place they could be—and sometimes were—directed against the citizens of this country for the collection of essentially domestic intelligence. In the 1960’s and early 1970’s, large numbers of American dissidents, including those who challenged the condition of racial minorities and those who opposed the war in Vietnam, were specifically targeted for mail opening by both agencies. In one program, selection of mail on the basis of “personal taste” by agents untrained in foreign intelligence objectives resulted in the interception and opening of the mail of Senators, Congressmen, journalists, businessmen, and even a Presidential candidate.

The first mail opening program began shortly before the United States entered World War II, when representatives of an allied country’s censorship agency taught six FBI agents the techniques of “chamfering” (mail opening) for use against Axis diplomatic establishments in Washington, D.C. The program was suspended after the war but reinstituted during the “cold war” in the early 1950’s; the method was similar but the targets new. Shortly after this program

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was reinstituted, the CIA entered the field with a mail opening project in New York designed to intercept mail to and from the Soviet Union. Between 1954 and 1957, the FBI and the CIA each developed second programs, in response to post-war events in Asia, to monitor mail entering the United States from that continent; and the CIA briefly conducted a third operation in New Orleans to intercept Latin and Central American mail as well. The technique of chamfering was most widely used by the FBI during the period 1959 to 1966: in these years the Bureau operated no fewer than six programs in a total of eight cities in the United States. In July 1966, J. Edgar Hoover ordered an end to all FBI programs, but the Bureau continued to cooperate with the CIA, which acted under no such self-restriction, in connection with the Agency's New York project. In 1969, a fourth CIA program was established in San Francisco and was conducted intermittently until 1971. The era of warrantless mail opening was not ended until 1973, when, in the changed political climate of the times, the political risk—"flap potential"—of continuing the CIA's New York project was seen to outweigh its avowed minimal benefit to the Agency.

All of these mail opening programs were initiated by agency officials acting without prior authorization from a President, Attorney General, or Postmaster General; some of them were initiated without prior authorization by the Directors or other senior officials within the agencies themselves. Once initiated, they were carefully guarded and protected from exposure. The record indicates that during the thirty-three years of mail opening, fewer than seven Cabinet level officers were briefed about even one of the projects: only one President may have been informed; and there is no conclusive evidence any Cabinet officer or any President had contemporaneous knowledge that this coverage involved the actual opening—as opposed to the exterior examination—of mail. The postal officials whose cooperation was necessary to implement these programs were purposefully not informed of the true nature of the programs: in some cases, it appears that they were deliberately misled. Congressional inquiry was perceived by both CIA and FBI officials as a threat to the security of their programs: during one period of active investigation both agencies contemplated additional security measures to mislead the investigators and protect their programs against disclosure to Congress. Only in rare cases did the CIA and the FBI even inform one another about their programs.

Many of the major participants in these mail opening programs, including senior officials in policy-making positions, believed that their activities were unlawful. Yet the projects were considered to be so sensitive that no definitive legal opinions were ever sought from either the CIA's General Counsel or the Attorney General. The record is clear, in fact, that the perceived illegality of mail opening was a primary reason for closely guarding knowledge of the programs from ranking officials in both the executive and legislative branches of the government.

The legal fears of CIA and FBI officials were firmly based, for sanctity of the mail has been a long-established principle in American jurisprudence. Fourth Amendment restrictions on first class mail

opening were recognized as early as 1878, when the Supreme Court wrote in *Ex Parte Jackson*, 96 U.S. 727, 733 (1878):

Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

This principle was re-affirmed as recently as 1970 in *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970): "It has long been held," the Supreme Court there wrote, "that first-class mail such as letters and sealed packages subject to letter postage—as distinguished from newspapers, magazines, pamphlets and other printed matter—is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment."

Not only the Fourth Amendment's prohibition against unreasonable searches and seizures, but First Amendment values of free speech are involved in the opening of first class mail. As Justice Holmes stated in 1921, in a dissent now embraced by prevailing legal opinion: "The use of the mails is almost as much a part of free speech as the right to use our tongues." *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921). Justice William O. Douglas quoted this passage with approval in a 1965 decision which invalidated a procedure whereby incoming third and fourth class propaganda could be indefinitely detained by Postal and Customs officials—a procedure, incidentally, which had provided cover for three CIA and FBI mail opening programs.¹ *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965). In 1974, in a case involving censorship of prisoner mail, the Supreme Court also noted that "the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication." *Procunier v. Martinez*, 416 U.S. 396, 403-409 (1974).

Statutory as well as constitutional protection has traditionally been accorded first class letter mail. Throughout the entire postwar period in which FBI and CIA mail opening programs were conducted, the statutory framework of legal prohibitions against the unauthorized opening of mail have remained essentially constant. The pertinent statutes, enacted in 1948 and substantially unchanged since then, are set forth below:

¹ See pp. 620-623, 643-644.

1. 18 U.S.C. Sec. 1701:

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than \$100 or imprisoned not more than six months, or both. (June 25, 1948, ch. 645, 62 Stat. 778.)

2. 18 U.S.C. Sec. 1702:

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, 62 Stat. 778.)

3. 18 U.S.C. Sec. 1703(b):

Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined not more than \$100 or imprisoned not more than one year, or both. (June 25, 1948, ch. 645, 62 Stat. 778; May 24, 1949, ch. 139, § 37, 63 Stat. 95; Aug. 12, 1970, Pub. L. 91-375, § 6(j) (16), 84 Stat. 778.)

The issue of proper authority for the opening of mail, which is raised by 18 U.S.C. Sec. 1703(b) above, was, until 1960, dealt with in 18 U.S.C. Sec. 1717(c): "No person other than a duly authorized employee of the Dead Letter office, or other person upon a search warrant authorized by law, shall open any letter not addressed to himself." This section was repealed in 1960 and recodified in essentially similar form at 39 U.S.C. 4057. When the Postal Service was reorganized in 1970, Section 4057 was in turn repealed and substantially recodified at 39 U.S.C. 3623(d), which provides in part:

No letter of such a class [i.e., first class] of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.

The only persons who can lawfully open first class mail without a warrant, in short, are employees of the Postal Service for a very limited purpose—not agents of the CIA or FBI.

In the face of the Constitution and these statutes, mail was surreptitiously opened for more than three decades—without warrant; without Congressional or clear Presidential authority; frequently without approval by senior agency officials; and, in the case of the most massive program, despite critical internal evaluations as well. Seasoned intelligence officers in both agencies genuinely believed that this activity was important to safeguard the country from foreign adversaries. But to defend the national security, they chose to employ a technique that was neither sanctioned by the laws nor authorized

by the elected leaders of the country they sought to protect. And since they defined the nature of our enemies, this technique came to be directed against American dissidents as well as foreigners.

PART II: CIA DOMESTIC MAIL OPENING

I. INTRODUCTION AND MAJOR FACTS

The CIA conducted four mail opening programs within the United States, the longest of which lasted for twenty years. These programs resulted in the opening and photographing of nearly a quarter of a million items of correspondence, the vast majority of which were to or from American residents. While the programs were ostensibly conducted for foreign intelligence and counterintelligence purposes, one former high-ranking CIA official characterized the Agency's use of this technique as a "shotgun" approach to intelligence collection:² neither Congressmen, journalists, nor businessmen were immune from mail interception. With cooperation from the FBI, domestic "dissidents" were directly targeted in one of the programs.

The major facts regarding CIA domestic mail opening may be summarized as follows:

a. The CIA conducted four mail opening programs in four cities within the United States for varying lengths of time between 1953 and 1973: New York (1953-1973); San Francisco (four separate occasions, each of one to three weeks duration, between 1969 and 1971); New Orleans (three weeks in 1957); and Hawaii (late 1954-late 1955). The mail of twelve individuals in the United States, some of whom were American citizens unconnected with the Agency, was also opened by the CIA in regard to particular cases.

b. The stated purpose of all of the mail opening programs was to obtain useful foreign intelligence and counterintelligence information. At least one of the programs produced no such information; however, and the continuing value of the major program in New York was discounted by many Agency officials.

c. Despite the stated purpose of the programs, numerous domestic dissidents, including peace and civil rights activists, were specifically targeted for mail opening.

d. The random selection of mail for opening, by CIA employees untrained in foreign intelligence objectives and without substantial guidance from their superiors, also resulted in the interception of communications to or from high-ranking United States government officials, as well as journalists, authors, educators, and businessmen.

e. All of the mail opening programs were initiated without the prior approval of any government official outside of the Agency.

f. Only five Cabinet level officials, and possibly one President, were briefed in varying degrees of detail about the New York program during the twenty years it continued, and there is no conclusive evidence that any of these officials ever authorized—or knew of—the mail opening aspect of the project. The evidence suggests that in the cases

² James Angleton testimony, 9/17/75, p. 28.

of some of these officials, their professed lack of knowledge about mail opening was due to a stated desire to remain ignorant of the details of the program.

g. No high-ranking government official was ever briefed about three of the four mail opening programs.

h. Postal officials whose cooperation was necessary to effect the programs were purposefully misled as to the purpose of the projects, the question of custody of the letters, and the fact of mail opening itself.

i. One President of the United States, whether through design or negligence, was given false and misleading information about the existence of CIA mail opening programs. In 1970, the Director of Central Intelligence signed a document for submission to the President which stated that all mail opening programs by federal agencies had been discontinued. This Director knew that at that time the most extensive CIA mail opening program continued to operate in New York.

j. Within the Agency itself, two former Directors of Central Intelligence did not authorize and apparently did not even know about any of the mail opening programs that were conducted during their tenure. Another former Director was unaware of at least one mail opening project during his term.

k. Some senior Agency officials whose approvals were sought in connection to one mail opening program were apparently deceived as to its true nature by middle-level officers. The senior officials were requested to authorize a mail cover operation only, but mail opening was both contemplated at the time of the requests and did in fact occur.

l. None of the programs was ever subjected to formal internal evaluation. Such review as did occur concluded that the largest of the programs were poorly administered and without substantial benefit to the CIA. These conclusions were ignored and the project continued.

m. Because of the extreme sensitivity of the projects and the internal pattern of compartmentation, many of those CIA components which could have derived the greatest foreign intelligence value from the product were not even aware of the mail opening programs.

n. Most of the major participants in the mail opening programs believed that the Agency's activities in this area were unlawful. No definitive legal opinion was ever sought from the CIA's General Counsel, and the evidence suggests that knowledge of the programs was purposefully withheld from him for security reasons.

o. The general reaction among Agency officials to the perceived illegality of mail opening was to fabricate "cover stories" for public consumption and to agree on a public denial of CIA domestic mail opening activity in the event such activity were exposed.

p. During periods of active Congressional investigation into invasions of privacy by federal agencies, and when persons knowledgeable of CIA mail openings were in a position to be called to testify before Congress, security precautions for mail opening programs were tightened to reduce the risk of exposure.

q. In part because of his "secrecy agreement" with the Agency, a former CIA employee who was in a position at the Postal Service to force the termination of a mail opening program was inhibited from doing so for several years. His loyalty to the CIA, even after he

left its service, prevented him from informing the Postmaster General of its existence.

r. The largest of the mail opening projects was not terminated until 1973, when, in the charged political climate of the times, it was considered too great a "political risk" to continue. It was not terminated because it was perceived to be illegal *per se*.

II. NEW YORK CITY MAIL INTERCEPT PROJECT

The CIA's New York mail intercept project, encrypted HTLIN GUAL by the Counterintelligence Staff and SRPOINTER by the Office of Security, was the most extensive of all the CIA's mail intercept programs, both in terms of the volume of mail that was opened and in terms of duration. Over the twenty year course of mail openings, more than 215,000 letters to and from the Soviet Union were opened and photographed by CIA agents in New York. Copies of more than 57,000 of these letters were also disseminated to the FBI, which learned of this operation in 1958, levied requirements on it, and received the fruits of the coverage until the project was terminated.

Despite the absence of clear authorization outside the CIA, despite the generally unfavorable internal reviews of the project in 1960 and 1969, and despite the facts that it was generally seen as illegal and that its primary value was believed by many agency officials to accrue to the FBI in the area of domestic intelligence, the momentum generated by this project from its inception in the early 1950's continued unchecked until February of 1973.

A. Operation of the Program

1. The Initial Phase: Mail Covers

The Original Proposal.—The New York mail project originated in the spring of 1952 with a proposal by the Soviet (SR) Division, supported by the Chief of the Operations Staff (now the Deputy Director for Operations) and the Office of Security, to scan exteriors of all letters to the Soviet Union and to record, by hand, the names and addresses of the correspondents. While the original plan did not contemplate the opening of mail immediately, it was recognized that "[o]nce our unit was in position, its activities and influence could be extended gradually, so as to secure from this source every drop of potential intelligence information available."¹ Specifically, it was believed that such a project could:

- “furnish much live ammunition for psychological warfare;
- “produce subjects, who if proven loyal to the United States, might be good agent material because of their contacts within the Soviet Union;
- “offer documentary material for reproduction and subsequent use by our own agents;
- “produce intelligence information when read in the light of other known factors and events; and

¹Memorandum from Chief, Special Security Division to Security Officer/CIA, 7/1/52. Thus, one can even at the initial stage the desire to exploit the anticipated cooperation of the Post Office Department.

Federal and Senior State Officials (e.g. Governor, Lt. Governor, etc.):

- a. No officials in above categories are to be watchlisted;
- b. No instructions to be issued to interceptors specifically requesting or forbidding the acquisition of items in cited categories; thus acquisition will be left entirely to chance;
- d. No special-category items shall be carded for inclusion in the HTLINGUAL Machine Records System;
- e. *Dissemination of special-category items will be at the discretion of DC/CI (and/or C/CI) only;*
- f. All special-category items will be filed in a separate file titled "SPECIAL-CATEGORY ITEMS", which will be kept in C/CI/Project's safe. . .²² (emphasis in original)

The new policy, therefore, did not prohibit the opening of letters to or from political figures; it simply created a special filing system for their mail. By the end of the project in 1973, the "Special-Category Items" file contained approximately ten photographs or summaries of correspondence to or from Senators Church and Edward M. Kennedy, one Congressman, and one Governor of an American territory.²³ Because the master index was on microfilm, the analysts were unable to purge all references to those politicians whose correspondence had been opened prior to December 1971.

2. Value of the Product

Foreign Intelligence and Counterintelligence.—There has been considerable debate among CIA officials over the value of the product from the New York operation to the Agency's foreign intelligence and counterintelligence mission.²⁴ James Angleton, who as Chief of the CI Staff was in charge of the project, was one of its most vocal supporters. He has testified that the New York project "was probably the most important overview [of Soviet intelligence activities] that counterintelligence had."²⁵ In a February 1973 memorandum for Director Schlesinger, Angleton, contending against termination, summarized some of the benefits to the CIA which resulted from the New York project as follows:

A. The mail intercept Project . . . provides information about Soviet-American contacts and insight into Soviet realities and the scope of Soviet interests in the academic, economic, scientific and governmental fields unavailable from any other source. The Project adds a dimension and a perspective to Soviet interests and activities which cannot be obtained from the limited resources available to this Agency and the FBI.

B. The Project is particularly productive in supporting both the Agency and the FBI in pursuing investigative and

²² Memorandum from Chief/CI/Project "for the record", 12/22/71.

²³ Letter from CIA to Senate Select Committee (Attachment), 9/23/75.

²⁴ The discussion in this sub-section relates only to the primary intelligence and counterintelligence value of the contents of the letters. As a by-product of the operation, TSD received a technical benefit from the opportunity to observe foreign censorship rates. (Letter from CIA to Senate Select Committee, 3/3/76.)

²⁵ Angleton, 9/17/75, p. 45.

operational leads to visiting Soviet students, exchange scientists, academicians and intellectuals, trade specialists and experts from organizations such as . . .

C. In many instances the Project provides the only means of detecting continuing contact between [Soviet] controlled exchange students and Americans.

D. The Project provides information otherwise unavailable about the Soviet contacts and travel of Americans to the Soviet Union. . . .

E. Project material recorded for 18 years gives basic information about Soviet individuals and institutions useful to the analyst looking for specific leads and in gauging trends in Soviet interests and policies.⁵⁵

This highly favorable assessment of the value of the product from HTLINGUAL contrasts sharply with the views of many other CIA officers. In a 1961 review of the project by the Inspector General's Office, for example it was written:

The SR (Soviet Union) Division is the project's largest customer in the Agency. Information from the CI Staff flows to the SR Support Branch and from there to the operational branches. It may include operational leads, such as the identities of individuals planning to work or reside in the USSR, or items of interest on conditions inside the country. In our interviews we received the impression that few of the operational leads have ever been converted into operations, and that no tangible operational benefits had accrued to SR Division as a result of this project. We have noted elsewhere that the project should be carefully evaluated, and the value of the product to SR Division should be one of the primary considerations.⁵⁶

A second internal review eight years later, in 1969, was no more enthusiastic. John Glennon, a former member of the Inspector General's staff which conducted this review, wrote:

. . . Although at one time this material was useful in Soviet legal travel operations and as positive information on Soviet internal economic and political matters, we find that the Clandestine Service has little interest in it now. Most of the officers we spoke to find it occasionally helpful, but there is no recent evidence of it having provided significant leads or information which have had positive operational results. The Office of Security has found the material to be of very little value. The positive intelligence from this source is meager.⁵⁷

In general, he noted that "the take from this program . . . is of little value to this Agency . . ." ⁵⁸ When Mr. Glennon was asked in recent public hearings whether he still agreed with this basic conclusion, he responded that, if anything, the product was probably even less valu-

⁵⁵ Memorandum from William E. Colby "for the record" (Attachment), 2/15/73.

⁵⁶ Memorandum from L. K. White, Deputy Director (Support) to Acting Inspector General (IG) (Attachment), 3/9/62.

⁵⁷ Blind memorandum, Subject: "Special Investigations Group/Project," undated.

⁵⁸ *Ibid.*

able than he indicated in 1969.³⁸ Howard Osborn, who was Director of Security from 1964 to 1974, and therefore responsible for the role played by the Office of Security during those years, agreed that his office received no value from the product. He publicly testified that "[w]e got no benefit from it at all. . . . The product was worthless."³⁹

Even Richard Helms, who was personally involved with the New York mail project on a decisional level from mid-1954 through the days immediately prior to the 1973 termination, was tepid in his evaluation of the project's value to the Agency. Of the product from 215,820 opened letters and nearly three million photographed envelopes, he said: ". . . I thought from time to time that the Agency got useful information out of it."⁴⁰

Domestic Intelligence.—Given the nature of the selection criteria, it is not surprising that a significant—perhaps the primary—portion of the product related to domestic, rather than foreign, intelligence concerns. The 1961 review of the project, for example, characterized the product as "largely domestic CI/CE [counterintelligence and counterespionage]."⁴¹ This representation was repeated in the 1969 Inspector General's report⁴² and, as developed more fully below, by numerous senior Agency officials in the early 1970's.⁴³

Only to the extent that the CIA's mission was perceived as encompassing "domestic CI/CE" matters could the Agency itself benefit from this type of information. Thus, Gordon Stewart, the Inspector General whose staff reviewed the New York project and found its positive intelligence value "meager," conceded that the project in 1969 may logically have been valuable in terms of the domestic surveillance activities the Agency was then conducting. He testified that in the late 1960's and early 1970's:

. . . we were involved in compiling files on subversives in this country, the youth, and so on. And there was an enormous amount of pressure being placed on the Agency by the White House to develop, if possible, a connection between subversive organizations in this country and some external groups, say the Communists or Moscow or something of that sort. It would seem to me to be logical that if that is what you were doing, maybe at one phase this project had been regarded as useful to the Agency.⁴⁴

But it is questionable whether analysis of foreign influence on domestic political activity is within the CIA's mandate at all. Such domestic counterintelligence concerns are an aspect of internal security, which is the responsibility of the FBI, not the CIA.⁴⁵

³⁸ John Glennon, 10/21/75, Hearings, Vol. 4, p. 20.

³⁹ Howard Osborn, 10/21/75, Hearings, Vol. 4, pp. 30, 31.

⁴⁰ Richard Helms, 10/22/75, Hearings, Vol. 4, pp. 102, 103.

⁴¹ Memorandum from L. K. White, Deputy Director (Support) to Acting Inspector General (Attachment), 3/9/62.

⁴² Blind memorandum, Subject: "Special Investigations Group/Project," undated.

⁴³ See e.g., p. 601.

⁴⁴ Gordon Stewart testimony, 9/30/75, pp. 45, 46.

⁴⁵ There is no documentary or testimonial evidence by CIA personnel connected with the New York project, moreover, that the project did in fact establish any significant pattern of foreign influence in domestic "subversive organizations."

Value to the FBI.—The Bureau did in fact receive a great deal of product from the New York operation: for all but three years between 1958 and 1973 the FBI actually received more copies or summaries of opened letters than did any single component of the CIA.⁶⁶ In view of the large quantity of disseminations to the Bureau and the largely domestic nature of the product generally, it is understandable that CIA officials assumed that the Bureau benefited significantly from the Agency's coverage. Angleton stressed the importance of this project to the Bureau's operations when he summarized its value for Director Schlesinger in 1973;⁶⁷ this point was noted in both of the Inspector General staff's reviews⁶⁸ and in the testimony of Howard Osborn⁶⁹ and Richard Helms.⁷⁰ Several CIA officials, convinced that the project was more valuable to the FBI than to the Agency itself, even recommended that the Bureau should assume operational responsibility for it.⁷¹

Ironically, however, the testimony of Bureau officials suggests that the CIA may have mistaken quantity of product for quality. It is undeniable that the FBI received some benefit from HTLINGUAL.⁷² But one senior Bureau official declared that any benefit received by the FBI had to be evaluated in light of the fact that the product was received gratuitously, with the expenditure of neither money nor manpower.⁷³ He stated that the project did not provide leads to the identification of a single foreign illegal agent and that much of the product received by the FBI was worthless.⁷⁴

In short, it is not clear that HTLINGUAL made any substantial contribution to the CIA's legitimate foreign intelligence and counter-intelligence mission or even to its questionable domestic intelligence activities; and while Agency officials assumed that the FBI benefitted greatly from their coverage, this assumption probably overestimated the actual value to the Bureau.

C. Internal Authorization and Controls

Unlike the FBI mail opening programs, the CIA's New York project was extremely de-centralized. It germinated and evolved without the prior approval of the Director of Central Intelligence at critical stages.⁷⁵ It continued through the tenure of at least two Directors who were apparently not even informed of its existence. Because it had been exempted from the usual approval system, many of the division heads who would normally have to approve any proposed project of this scope were also never briefed and consequently had no opportunity to challenge the necessity or wisdom of the project. It was

⁶⁶ See table, p. 832.

⁶⁷ Memorandum from Colby "for the record" (attachment), 2/15/73.

⁶⁸ Memorandum from L. K. White to Acting Inspector General (attachment), 3/9/62; Blind memorandum, Subject: "Special Investigations Group/Project", undated.

⁶⁹ Howard J. Osborn testimony, 8/23/75, p. 33.

⁷⁰ Helms, 10/22/75, Hearings, vol. 4, pp. 102, 103.

⁷¹ See pp. 601, 603.

⁷² See pp. 632-634.

⁷³ Staff summary of William A. Branigan interview, 9/11/75.

⁷⁴ William A. Branigan, 10/24/75, Hearings, vol. 4, p. 163.

⁷⁵ Allen Dulles, who was Director when the project was initiated, apparently did know about it. But there is no indication that he was informed about its mail opening aspect until May 1958, well after opening began. See pp. 530-531.

light of Cotter's ultimatum, to suspend the operation "unless Mr. Cotter would accept its continuance for the time being under our assurances that the matter is being prosecuted at a very high level."¹⁹³

Cotter refused to extend his deadline, and William Colby authorized the suspension of the project on February 15, 1973. Colby notified Howard Osborn of the suspension and Osborn instructed the Office of Security's Manhattan Field Office to shut down the operation that afternoon. There is no evidence that any attempt was subsequently made to secure Presidential approval, and when the FBI refused to assume operational responsibility (for reasons discussed below), the suspension proved to be permanent.

F. Legal Considerations and the "Flap Potential"

Within the Agency, the legality of the New York mail opening project was perceived to be dubious at best. Among those agents and officers connected with it who considered its legal implications at all, some believed that the project would have been illegal but for the internal and external approvals which they assumed—sometimes erroneously—had been granted. Most simply recognized HTLINGUAL to be illegal but rationalized it nonetheless. The general reaction to the questionable legality of the project was neither to stop it nor to seek a definitive opinion as to its legal status; it was to tighten security in order to reduce the risk of exposure to Congress and the general public. The evidence regarding its termination, moreover, suggests that it was finally discontinued not so much because it was thought to be illegal *per se*, as because the so-called "flap potential"—the risk of embarrassment to the CIA that stemmed from its dubious legality—was seen to outweigh its foreign intelligence and counterintelligence value to the Agency.

1. Perceptions of Legal Issues Within the Agency

Generally, those agents who served on the "front lines" of the New York project, the interceptors and the analysts, did not concern themselves with legal issues at all; they did not ask if what they were doing was within or outside the law, and they were not told. As one of the agents who opened the mail in the New York facility said, "We would speculate when an Attorney General or a Postmaster would change, or even a President, if they would be briefed, [but] this would be knowledge which would never concern us. We would never be told . . . [Our work] was something that one entered into and did."¹⁹⁴

Among those Agency officials in a policymaking position, a few have testified that while they knew the legality of the project to be questionable, they believed that prior approvals internally and externally made it at least arguably lawful. Thomas Karamessines, former Deputy Director for Plans, for example, stated that because he believed the project had been discussed with a Postmaster General and Chief Postal Inspector, both of whom, he understood, had approved of it, the project must have fallen within an exception of the general statutory prohibition against mail opening.¹⁹⁵ His belief was buttressed by the participation of the FBI, the chief law enforcement agency in the country, and by the fact that he was told—erroneously—that Post

¹⁹³ *Ibid.*

¹⁹⁴ CIA Officer, 9/30/75, pp. 35, 36.

¹⁹⁵ Thomas Karamessines testimony, 10/8/75, p. 22.

Office Department lawyers had participated in the briefings of Postal officials and that at least one President had approved it.¹⁹⁶ Richard Helms also testified that he did not assume the project was necessarily illegal. Since Allen Dulles, a former Director and eminent lawyer, knew of the project and presumably had "made his legal peace with [it]," Helms said that he never seriously questioned its legal status while it continued under his own tenure.¹⁹⁷ This testimony is partially contradicted, however, by the fact that in 1970 Helms signed the Huston Report, in which covert mail coverage (mail opening) was specifically described as illegal and without the "sanction of law."¹⁹⁸ Helms and the other signers of the Report presented the President of the United States with the option of authorizing a technique which they themselves characterized as unlawful.

Most of the Agency officials who have testified on this subject simply assumed that mail opening was illegal. Gordon Stewart, who was appointed Inspector General by Richard Helms in 1968 and reviewed the Staff's role in the project in 1969, said flatly, "[O]f course we knew that this was illegal."¹⁹⁹ When he discussed the 1969 report with Helms, he believed it was "unnecessary" to raise the matter of its illegality "since everybody knew that it was [illegal] and it didn't seem to me that I would be telling Mr. Helms anything that he didn't know."²⁰⁰ Howard Osborn agreed with this characterization of the project's legal status. He testified that at one point in the early 1970's, he approached Karamessines and "said this thing is illegal as hell."²⁰¹ Even James Angleton, the project's strongest supporter and, as Chief of the CI Staff, the official most directly responsible for its operation, testified that his understanding of its legality was simply: "That it was illegal."²⁰² When asked how he could rationalize conducting a program he believed to be illegal, he answered that in his opinion, the project's benefit to the national security outweighed legal considerations.²⁰³

The documentary record of the project supports the views of those officials who testified that within the Agency the project was perceived as illegal. References to the lack of legal authority for mail opening in peacetime are found in internal memoranda written as early as 1955²⁰⁴ and 1962.²⁰⁵ An internal document dated September 26, 1963, explicitly states: "There is no legal basis for monitoring postal communications in the United States except during time of war or national emergency when the President creates an independent government agency called the Office of Censorship . . ."²⁰⁶ It notes that "for

¹⁹⁶ Karamessines testimony, 10/8/75, pp. 22, 23. Karamessines stated that ". . . I have gathered since that this may have been erroneous information given to me or a misunderstanding on my part." (Karamessines, 10/8/75, p. 23.)

¹⁹⁷ Richard Helms, 10/22/75, Hearings, vol. 4, p. 94.

¹⁹⁸ Special Report: Interagency Committee on Intelligence (Ad Hoc), June 1970, p. 30.

¹⁹⁹ Gordon Stewart testimony, 9/30/75, p. 28.

²⁰⁰ Stewart, 9/30/75, p. 32.

²⁰¹ Osborn, 8/28/75, p. 39.

²⁰² Angleton, 9/24/75, Hearings, vol. 2, p. 88.

²⁰³ *Ibid.*

²⁰⁴ Blind memorandum "for the Record", Subject: "HTLINGUAL," 11/7/55.

²⁰⁵ Memorandum from Deputy Chief, Counterintelligence Staff to Director, Office of Security, 2/1/62; Memorandum from Sheffield Edwards, Director of Security to Deputy Director (Support), 2/21/62.

the purposes of the above statement, the word monitoring is given the meaning of examining the contents of postal communications without necessarily notifying addressee or sender that this is being done."

During the course of the project, there was only one documented attempt to develop a legal theory on which mail opening could be predicated; paradoxically, it was presented in the context of an argument for terminating, not continuing, the project. In the paper which William Colby used to brief James Schlesinger about the project in its final days, Colby wrote:

While the recording of the addresses and return address is totally legal, the opening of first-class mail is in conflict with 39 U.S. Code Section 4057. A contention can be made that the operation is nonetheless within the Constitutional powers of the President to obtain foreign intelligence information or to protect against foreign intelligence activities (powers statutorily recognized in 18 U.S.C. Section 119 [sic], with respect to bugging and wiretapping).²⁰⁷

Two Postmasters General who were briefed on at least some aspects of the New York project—Edward Day and Winton Blount—testified that such an argument may have merit; for this reason, neither was certain that the CIA's New York project was plainly illegal.²⁰⁸

The United States Supreme Court held in *United States v. United States District Court*, 407 U.S. 297 (1972), however, that the statutory section to which Colby apparently referred does not represent an affirmative recognition by Congress of Presidential power with regard to foreign intelligence and counterintelligence; it is, in effect, a statement of Congressional neutrality and deference to the judiciary in defining the scope of the President's power if any in this area. This section, moreover, relates to electronic surveillance only; those statutes which prohibit warrantless mail opening²⁰⁹ contain no analogous "ex-

²⁰⁷ Memorandum from Chief, CI Project to Chief, Division 9/26/63.

²⁰⁸ Blind memorandum, Subject: "Mail Intercept Program," 2/14/73. From the context of the second sentence, it appears that the correct statutory citation should be Title 18, Chapter 119, Sections 2510-20, rather than 18 U.S.C. Section 119. The specific section to which Mr. Colby apparently refers is 18 U.S.C. 2511(3).

²⁰⁹ Edward Day, 10/22/75, Hearings, p. 53; Blount, 10/22/75, Hearings, p. 52. Day added that:

"If the CIA lawyers concluded that the CIA could not open mail to and from Communist countries in the early 1960's without violating the law, I think the CIA needs better lawyers.

"One can't answer such a unique legal question merely by reading from various postal statutes and citing court decisions relating to warrantless mail openings from the 19th century, which did not involve spying, cold war or subversive activities. A less simplistic approach to the problem is required.

"For example, statutes clearly say it is a crime to kill or attempt to kill someone with premeditation. These statutes, and others making felonies of arson, kidnapping, etc., do not say 'except in time of war.' But we all know that exception is read into these laws (even if the killing or arson was in a 'war' of doubtful legality ordered by Lyndon Johnson and Richard Nixon).

"In my opinion, the statutes relating to opening of mail must similarly have read into them an exception for opening mail to and from Communist countries by the CIA in time of cold war."

(Letter from J. Edward Day to the Chief Counsel, Senate Select Committee, 10/24/75.)

²¹⁰ See p. 564.

ception." Furthermore, even if the President may constitutionally authorize warrantless mail opening for national security reasons, no President ever clearly authorized this program specifically or (with one five-day exception in 1970^{209a}) the use of mail opening as an investigative technique generally.

Regardless of its merits, this first attempt at developing a legal theory to justify HTLINGUAL was not even set forth until February 14, 1973—one day before the suspension of the project. For twenty years prior to this date, the New York project had continued without the benefit of any perceived legal support.

2. Role of the General Counsel

The CIA's General Counsel was not asked for a legal opinion on Colby's theory. At no time, in fact, was the General Counsel ever requested to evaluate the legal aspects of the New York project; all the evidence, including the statement of the holder of this office himself,^{209b} suggests that the General Counsel was never even aware of the project's existence.

Thomas Abernathy, who, as a member of the Inspector General's staff in the early 1960s had been in charge of the first review of the New York project, conceded that his review did not include consultations with the General Counsel, because legal matters were a matter for "top management."²¹⁰ The 1969 review, headed by Inspector General Gordon Stewart, also bypassed the Office of the General Counsel. Stewart testified to at least two reasons why the General Counsel had no input into the project evaluation. First, the Inspector General's line of authority ran only to the Director of Central Intelligence; he had no independent authority to consult the General Counsel directly.²¹¹ Second, he believed that the security of the project precluded his broadening the circle of witting persons, even when the person to be included would be the Agency's own General Counsel.²¹² He testified:

Well, I am sure that it was held back from him [the General Counsel] on purpose. An operation of this sort in the CIA is run—if it is closely held, it is run by those people immediately concerned, and to the extent that it is really possible, according to the practices that we had in the fifties and sixties, those persons not immediately concerned were supposed to be ignorant of it.²¹³

Richard Helms also testified that he never consulted the General Counsel with regard to the legality of the operation, nor did he know of any attempt by anyone else to do so.²¹⁴ He stated that in general, "sometimes we did [consult the General Counsel for statutory interpretations]; sometimes we did not. I think the record on that is rather spotty, quite frankly."²¹⁵

^{209a} See p. 597.

^{209b} Staff summary of Lawrence Houston interview, 10/15/75.

²¹⁰ Thomas Abernathy testimony, 9/29/75, p. 47.

²¹¹ Stewart, 9/30/75, p. 30.

²¹² *Ibid.*

²¹³ Stewart, 9/30/75, p. 29.

²¹⁴ Helms, 9/10/75, p. 58.

²¹⁵ Helms, 9/10/75, p. 59.

3. The "Flap Potential"

Because many Agency officials connected with the project viewed it as illegal, and because many of these officials also saw it as essentially domestic surveillance and therefore outside the CIA's jurisdiction in any event, there was general concern over the project's so-called "flap potential." This term was used by Agency officials to describe the risk of embarrassment to the CIA that would result from the revelation of such a project to the general public and to Congress. It was this concern over the project's flap potential that led to a general tightening of security, to the creation of "cover stories," and other strategies in case of exposure, and, ultimately, to the termination of the project.

In the CI Staff's original proposal in November 1955 to expand the New York project to include large-scale mail opening, James Angleton recognized that "[t]here is no overt, authorized or legal censorship or monitoring of first class mails which enter, depart or transit the United States at the present time."²¹⁶ He noted, therefore, that "[i]n the event of compromise of the aspect of the project involving international monitoring of the mails, serious public reaction in the United States would probably occur. Conceivably, pressures would be placed on Congress to inquire into such allegation . . ." At this point, however, he was confident that such inquiries could be thwarted. He continued: "... but it is believed that any problems arising could be satisfactorily handled."²¹⁷ He wrote that the "cover story" was that the CIA interceptors were in fact "doing certain research work on foreign mail..."²¹⁸

The review of the Office of Security's role in the project in the early 1960s raised the "flap potential" problem again. The Inspector General's report formally recommended that: "An emergency plan and cover story be prepared for the possibility that the operation might be blown."²¹⁹ In response to this recommendation, the Deputy Director of Security suggested that in case of a local compromise in New York, the "Office of Security would utilize its official cover to explain any difficulties," and noted that "high-level police contacts with the New York City Police Department are enjoyed, which would preclude any uncontrolled inquiry in the event police action was indicated."²²⁰ If citizens complained about lost mail, he suggested that the proper course should be "referral to the Post Office Department for a normal official inquiry into lost registered mail."²²¹ Finally, if the project was revealed by a disgruntled Agency employee, the Deputy Director of Security wrote that the charge "may be answered by complete denial of the activity."²²²

The Deputy Chief of the Counterintelligence Staff also responded to the Inspector General's recommendation for a cover story. He wrote that "a 'flap' will put us 'out of business' immediately and may give

²¹⁶ Blind memorandum "for the Record", Subject: "HTLINGUAL," 11/7/55.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ Memorandum from L. K. White to Acting Inspector General (Attachment), 3/9/62.

²²⁰ Memorandum from Deputy Director of Security to Chief, CI Staff, 1/11/62.

²²¹ Memorandum from Deputy Director of Security to Chief, CI Staff, 1/11/62.

²²² *Ibid.*

rise to grave charges of criminal misuse of the mails by government agencies,"²²³ and argued:

Since no good purpose can be served by an official admission of the violation, and existing Federal statutes preclude the concoction of any legal excuse for the violation, it must be recognized that no cover story is available to any Government Agency. Therefore, it is important that all Federal law enforcement and U.S. Intelligence Agencies vigorously deny any association, direct or indirect, with any such activity as charged . . .

. . . Unless the charge is supported by the presentation of interior items from the Project, it should be relatively easy to "hush up" the entire affair, or to explain that it consists of legal mail cover activities conducted by the Post Office at the request of authorized Federal agencies. Under the most unfavorable circumstances, . . . it might be necessary after the matter has cooled off during an extended period of investigation, to find a scapegoat to blame for unauthorized tampering with the mails. Such cases by their very nature do not have much appeal to the imagination of the public, and this would be an effective way to resolve the initial charge of censorship of the mails.²²⁴

The views of the Deputy Chief of the CI Staff were adopted by the Director of Security Sheffield Edwards in February 1962.²²⁵

Three years later, the Long Subcommittee's investigation was believed to increase the risk of project exposure. An internal CIA memorandum dated April 23, 1965, states:

Mr. Karamessines [Assistant Deputy Director for Plans] felt that the dangers inherent in Long's subcommittee activities to the security of the Project's operations in New York should be thoroughly studied in order that a determination can be made as to whether these operations should be partially or fully suspended until the subcommittee's investigations are completed.²²⁶

When it was learned that Chief Postal Inspector Henry Montague had been contacted about the Long investigation and believed that it would "soon cool off," however, it was decided to continue the operation.²²⁷ No security changes were made, but Karamessines recommended that the program should be brought to the attention of President Johnson.

Although the Long subcommittee investigation did indeed "cool off" in 1966, the elevation of William Cotter to the position of Chief Postal Inspector in 1960 again raised the specter of discovery by Congress. A CIA internal memorandum written on the day that Cotter was sworn in shows that both Agency officials

²²³ Memorandum from Deputy Chief, Counterintelligence Staff, to Director, Office of Security, 2/1/62.

²²⁴ *Ibid.*

²²⁵ Memorandum from Sheffield Edwards, Director of Security, to Deputy Director (Support), 2/21/62.

²²⁶ Memorandum from "CIA Officer" to "the Files", 4/23/65.

²²⁷ *Ibid.*

and Cotter himself recognized that whereas Henry Montague did not know of the mail opening aspects of the project and, therefore, could "testify under oath on the Hill in such a way as to—in effect—protect HTLINGUAL[,] Cotter will not be in such a position and will be particularly vulnerable in the event of a flap in view of his own past affiliation with the Agency."²²⁸ The minutes of the meeting of top Agency officials in the Director's office on May 19, 1971, also make clear that their concern over the Jeremy Stone letter focused largely on the fact that Cotter "would be unable to [deny knowledge of mail opening] under oath"²²⁹ before a congressional committee, as Mr. Montague had been able to do, if the letter created adverse publicity.

The various recommendations for terminating the project before 1973 were predicated not on the perceived illegality of the operation *per se*; but, to the extent legal factors were present at all, they were based on the "flap potential" stemming from its questionable legal status. The 1969 Inspector General's report, for example, cited lack of value to the Agency and "the continued flap potential inherent in this program"²³⁰ as grounds for its formal recommendation to request the FBI to assume responsibility for the project or, if the Bureau refused, to consider its discontinuance. The report did not raise legal questions directly, even though the then-Inspector General testified that he believed the project to be illegal at the time. At the May 1971 meeting of Agency officials concerning the security of HTLINGUAL, Deputy Director for Plans Thomas Karamessines also recommended that CIA involvement be discontinued because "any flap would cause the CIA the worst possible publicity and embarrassment"²³¹—not because of the illegality of the project itself.

When the project was finally terminated in 1973, the evidence suggests that the decision did not turn on a determination that it was illegal—indeed, for the first time it was suggested that it might be legal. Rather, Director James Schlesinger accepted William Colby's evaluation that "[t]he political risk of revelation of CIA's involvement in this project is in any case substantial . . . [and] is not justified by the operation's contribution to foreign intelligence and counterintelligence collection."²³²

In short, many of its major participants saw the New York project as illegal. While a few CIA officials believed that it was lawful, neither the General Counsel nor the Attorney General²³³ was ever consulted for a legal opinion. Agency officials reacted to the project's generally

²²⁸ Memorandum from SA/C/CI "for the Record," 4/7/69.

²²⁹ Blind memorandum, Subject: "DCI's Meeting Concerning HTLINGUAL," 5/19/71.

²³⁰ Blind memorandum, Subject: "Special Investigations Group Project," undated.

²³¹ Blind memorandum, Subject: "DCI's Meeting Concerning HTLINGUAL," 5/19/71.

²³² Blind memorandum, Subject: "Mail Intercept Program," 2/14/73.

²³³ When Richard Helms was asked in public session whether, during his meeting with Attorney General John Mitchell in 1971, Mr. Mitchell expressed an opinion as to the legality of the project, he replied that Mitchell had not, and added, "I went to see him for a purpose . . . [a]nd my purpose was to get his advice as to whether it was desirable to see Mr. Blount, the Postmaster General, on this mail operation." (Helms, 10/22/75, Hearings, vol. 4, p. 69). As noted above, Mr. Mitchell does not recall being informed of the New York mail opening project at all and there is no indication in the record that any other Attorney General was ever so informed.

perceived illegality, especially when it was threatened by congressional investigations, by focusing even more closely on the security precautions necessary to prevent exposure. Cover stories, designed to obscure the CIA's true activities, were fabricated, and, in recognition of the absence of any "legal excuse," it was ultimately agreed that the project's very existence should be flatly denied in the event of a serious "flap." "Admission" was a strategy that apparently was never considered. The project was finally terminated when, in a new political climate created by Watergate, it was decided that the political risk inherent in conducting such an operation clearly outweighed the project's minimal value to the Agency.

III. OTHER CIA DOMESTIC MAIL OPENING PROJECTS

While the New York project was clearly the most massive one, the CIA also conducted at least three other domestic mail opening projects: in San Francisco, on four separate occasions between 1969 and 1971; in New Orleans, for three weeks in 1957; and in Hawaii, for approximately one year in 1954 and 1955. In addition, the domestic mail of twelve foreign nationals, CIA employees, and American citizens unconnected with the Agency was also opened during particular investigations.

These mail opening projects present many of the major themes of the New York project: the lack of authorization, both internal and external; the deception of postal officials; the random selection of mail for opening; the attention to the correspondence of American "dissidents", despite the stated foreign intelligence and counter-intelligence purposes; and the lack of formal review and evaluation. Some of these other programs were more tightly administered than the New York projects, and others more successful in achieving their goals, but taken as a whole the same patterns emerge. In several cases—such as the San Francisco mail project, for which internal approvals were secured through misrepresentation of its true nature; and the Hawaiian project, which was initiated by a sole field agent without any authorization from Headquarters—these themes are even more clearly defined.

A. The San Francisco Mail Intercept Project

The San Francisco mail intercept project, known as WEST-POINTER by the Office of Security and KMSOURDOUGH within the Plans Directorate, involved the exterior examination and opening of mail from an East Asian country to the United States. It was conducted jointly by the Far East Division (FE) and TSD, with the Office of Security providing cover and support. While referred to as a single project, it actually involved four separate trips, each of one to three weeks duration, by CIA personnel from Headquarters to the San Francisco area, in September 1969, February and May 1970, and October 1971. Only envelope exteriors were inspected on the first trip, but mail was both opened and subjected to chemical tests on the latter three. Although authorizations were obtained from the Director and from the Deputy Director of Plans and the Director of Security, the record suggests that these authorizations were for a mail cover opera-

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SURVEY OF PROJECT POINTER

MAR 19

Nature of the Project

Project POINTER exists to exploit for security and intelligence purposes certain mail passing through U. S. Post Office Department channels between the United States and the Soviet Union. The Project examines regular air mail between the two countries which is handled at the Kennedy International Airport in New York City, whether incoming or outgoing. It does not include registered air mail or surface mail of any type. Not only are the envelopes or external containers inspected, but the contents themselves are subjected to scrutiny.

Predication for Survey

In a recent review of budget matters within the Office of Security, question was raised as to the cause and need for overtime costs on this Project, which is administered by the Manhattan Field Office. Overtime compensation last year on the Project totaled approximately \$8,000 and was the only substantial item of overtime in the entire Office of Security, except for file-room operations. When an attempt was made to determine from Headquarters records what the justification might be for the overtime, it was found there was but a modicum of current information on paper which explains the activity, its personnel and its costs. This paucity of written data is due to the sensitivity of the Project, precluding the compilation through the years of numerous memorandums and correspondence which conceivably might have compromised or otherwise have diluted the security of the operation, with its international connotations and its illegal actions. After the budget review, however, it was felt a survey with a comprehensive report prepared under appropriate security control procedures was warranted, so Headquarters could have a complete verbal picture of the Project. The Director of Security accordingly requested a survey with a detailed report thereon.

History of the Project

The initial examination of mail by MFO was in 1953 and the Project has been in continuous operation since then. In the beginning, a Post Office inspector (Henry B. Montague) at the General Post Office in Manhattan was approached with the request that we be permitted to determine whether mail was being transmitted between

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certain persons and organizations located either in the USA or the USSR. About a half dozen names originally were involved. The inspector permitted MFO agents to sit in a room in the GPO and look over the mail, writing in longhand names and addresses of senders and receivers of the letters with which we were concerned. The PO inspector stayed in the room as the MFO agents made their examination and recorded the information. All types of mail (surface, registered and air) were observed.

As rapport and confidence developed through the ensuing months and years, the PO inspector permitted more freedom to us, not keeping the MFO agents under constant surveillance as they examined the mail, and ultimately letting them photograph the names and addresses on the envelopes. Also, the number of names on the "watch-list" increased into the hundreds. As conditions in the handling of the mails changed with the passage of time, and most trans-Atlantic matter began moving by air rather than surface, the international airport (then Idlewild, later called Kennedy) went into operation, and our activity (with a brief interim period at LaGuardia Airport) moved to the Kennedy airport. Our examination presently is confined to regular air mail only, as the inspection of registered air mail was discontinued because of the difficulty in handling such items due to the tight controls maintained by the Post Office Department on this class of mail. As volume of items examined by us grew, the Post Office made available a room at the international airport for the operation, and assigned (about 1960) a clerk full time to assist us.

Under normal Post Office Department procedures, all air mail (with a few minor exceptions) originating within the United States destined for the Soviet Union is dispatched from Kennedy International Airport, and all air mail originating within the Soviet Union headed for the USA is dispatched from Moscow and sent to Kennedy. Obviously, this routine is interrupted at times when weather or other unusual conditions require planes to be diverted from Kennedy when it is temporarily closed, to points such as Montreal and Boston which are open at the time. Currently, about 30 per cent of the USA outgoing air mail (called "out-air") is made available to our Project, and about 55 per cent of incoming USSR air mail (called "in-air"). The number of letters handled each day by the MFO agents at the airport is variable due to the ebb and flow in normal volume of the mail, but seldom is less than several thousand items daily, usually running around 5 or 6 thousand, and on occasion as high as 8 or 10 thousand. Theoretically, we could have access to all of the regular air mail

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both ways, but limitations of time and manpower, operational conditions and security considerations make the above percentages about the maximum we can now handle. The factors restricting the amount of mail we inspect will be discussed more fully later in this report.

A Diebold camera is maintained in the room at the airport for photographing mail covers or envelopes, but through the years confidence has developed to the point where the PO clerk permits the MFO agents to take a limited number of items back to the field office in mid-town Manhattan for further inspection and examination, with return the following morning. While the PO clerk, of course, is aware that we take out and bring back letters, there is nothing to indicate that the PO inspector in charge in New York City (now Robert L. Munro, Mr. Montague meanwhile having become Chief Postal Inspector for the Department stationed in Washington) knows or suspects that we actually remove items from Post Office Department custody. Nor is there any indication that the PO clerk knows that we actually open and examine the contents of the items he lets us take into the field office. The fact should be emphasized that no Post Office Department officer or employee expressly or impliedly has permitted us to open letters and inspect their contents, nor is there any indication that anyone in the Department is even aware that we might be doing so. The only activity granted to us by the PO inspector is to photograph the mail covers on site, and the only additional activity granted to us by the PO clerk is to take some letters into the field office for a more detailed examination of their exteriors.

Details of the Operation

The room at the airport utilized by the MFO agents contains approximately 200 square feet of space and is on the second or top floor of Building 179, which is called the Airport Mail Facility or AMF. The PO activity in this building receives and processes the in-air matter arriving at Kennedy from overseas. It consists primarily of large-area working spaces for handling mail on both floors, except for half a dozen rooms for administrative offices, of which our room is one. Probably 150 or so PO employees work in the building, and Mr Hanna the superintendent of the facility, is located there. During the hours our room is manned by the PO clerk and the MFO agents, the bags of non-registered air mail from Moscow are delivered to the room for us to look at their contents. When our room is not manned, incoming air mail is processed by the facility and sent on its way without our seeing it.

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Out-air matter which originates in the United States and is to be dispatched from Kennedy is received and processed in Building 15, which is called the U. S. Post Office and is located about a mile and a half from Building 179. During the hours our room is manned, the non-registered out-air for Moscow is bagged in Building 15 and trucked to 179 for our inspection, after which it is returned to 15 for loading on planes. There are normally about three deliveries a day of this material to our room. When our room is not manned, this out-air is processed and sent on its way from Building 15 without our seeing it.

The Project operates at the airport 5 days a week in order to let the PO people know that the space is fully utilized during normal workdays, but the actual substantive "take" of the operations is limited to Monday through Thursday. This is necessarily so because of the 24-hour rule which requires that the mail made available to us in the room in Building 179 be returned to regular PO channels within that time period. Therefore, ordinarily, we cannot take items into the field office on Friday for processing by us, as we could not return them to the AMF before Monday, under present operating conditions. Nevertheless, on Friday, Thursday's "take" is returned, envelopes or covers are photographed on site, and if several really worthwhile items are picked up which should have laboratory processing, they are taken in to MFO and brought back the same day. Obviously, no quantity of mail can be handled on this expedite basis.

Only three of the MFO agents work at the AMF, and they are the same men day in and day out (IDEN's #97, #194, #193), as any greater number or different individuals would needlessly draw attention to our Project and jeopardize its success. Apparently, PO officers and employees at the AMF think our men are a part of the PO inspection system and ask no questions, and the going and coming of our men are most discreet. These men are practically full time on the Project, although #97 and #193 are used by the SAC on some mornings briefly to in Manhattan which are not connected with the Project. #194 is entirely on the Project.

#194 goes directly to the AMF from his home first thing every morning 5 days a week and, with Pete McAuley, the PO clerk who works from 0730 to 1530 daily, begins inspecting the available mail and selecting items of interest, either to be photographed on site or to be taken into the laboratory for further examination.

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About 1130, #194 takes items selected to that time and proceeds to the field office laboratory with them, where he spends the balance of the day working on them.

#193 usually the first thing each morning, then proceeds to the field office laboratory, where he arrives around 1000 hours. He examines the mail which has been processed the previous day, makes any minor repair which may be required and removes any excess adhesive gum which is apparent, and then departs for the airport around 1130, carrying with him the mail which is to be returned to PO custody and channels, and also taking copies of the watch-list. Once in the room at the AMF, he uses the Diebold camera there to photograph select envelopes or covers. He leaves the airport to return to HQ about 1500 or 1530 hours each day.

#97 spends practically all of his time on the Project, except for Monday and Friday mornings, on which days he then goes to the field office and prepares Project reports and gets the Project material organized for sending to Headquarters, packages normally being sent to Washington twice a week. On Tuesday through Thursday he goes directly to the airport from his residence, where he works with #194 and McAuley on inspecting and selecting items for processing. About 1500 to 1530 hours, #97 and #193 depart from the AMF with the day's "take," including both actual mail and the Diebold film of photographed covers, together with the copies of the watch-list, and go to the field office laboratory in Manhattan.

The laboratory in Manhattan is in the same building as, but on the floor below, the field office. All Project mail is handled in this space only, not being taken to the field office; nor are field office personnel permitted in the laboratory, other than the agent-type employees who actually work on the mail. #97 dictates his reports in a special room in the field office to a stenographer who is assigned specifically for this work, which is not given to other clerical personnel in the office to handle; this stenographer is not permitted in the laboratory.

The laboratory normally is in operation from about noon to 2100 hours Monday through Thursday (except for #193 going in the morning to pick up mail to be returned to the AMF), and from 0830 to 1700 hours on Friday. The MFO normal workday hours are 0830 to 1700 every day. The manning of the laboratory Monday

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through Thursday from 1700 to 2100 hours is accomplished by agent-type personnel working overtime. Evening hours are required in the laboratory Monday through Thursday, as much of the AMF "take" on those days does not reach the field office until just before normal closing time, and it must be processed the same day for return to the airport the following morning.

Usually two men work each evening the laboratory is operated, and this task is rotated among two of the regular personnel of the Project (iden's #97 & 194 and other agents in the field office who have been assigned to it, each man selected ordinarily not working more than one night a week. The two men who work nights have specific duties, one being a "stickman" who opens letters, sketches the exact position of their contents so they can be put back in proper order, and reseals them after processing; the other being a "machine man" who copies on a Xerox both the envelopes and their contents. The mail which is resealed is placed overnight in large dictionary-type books for proper pressure to insure the adhesive sticking:

It is obvious from the above description, based upon actual observation of all phases of the Project, that, as presently operated, 8 hours overtime daily four times a week is mandatory for the smooth functioning of the work.

Technical Processing of Mail

In addition to the copying of envelopes and contents covered above which is performed entirely by the staff of the Manhattan Field Office of the Office of Security, certain technical examination is done by a contract employee, iden #92 who works only in the field office laboratory, his workday being noon to about 2100 hours Monday through Thursday and 0830 to 1700 on Friday. His equipment is furnished by and it enables him to examine items

He has names of addressees and senders in whom he is especially interested, and also various locations in the Soviet Union which change from time to time

His requirements for items are given to the MFO agents who do the selection at the AMF. He prepares his own reports and sends them to in Headquarters.

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Transportation of Material in New York City

The mail taken from Post Office Department custody at the Airport Mail Facility by the MFO agents is transported to the laboratory in Manhattan and returned to the airport by one or another, or a combination, of several methods of transportation. The men hand-carry the mail in zipper-type leather brief cases and travel vehicularly by personally-owned car, government-owned car, and subway and elevated train. Of course, between these methods of travel and the points where they leave them to go to or from the laboratory, they walk. Sometimes the men travel in pairs, but frequently they travel alone with the material. The areas involved vehicularly are from Manhattan to the Kennedy International Airport and return, a distance of approximately 18 miles one way. The walking is done in Manhattan on the busiest of streets, and in Queens and Astoria from parking lot to elevated station. Several city blocks are usually involved in this walking.

The reports prepared on the Project together with the Xerox copies of opened mail (both envelopes and contents) and the Diebold photographs of covers are placed in sealed envelopes in the field office and then carried to the postal station several blocks away, normally by one of the girls in the office and usually walking alone. The packages are sent by registered mail to the Office of Security in Washington.

Headquarters Handling of Project Material

The registered mail containing the Project material prepared by the Manhattan Field Office is sent to a post office box address at the Main Post Office in Washington where it is picked up by a courier from the District Field Office, traveling alone in a Government-owned car, who takes it to the Office of Security in the Headquarters Building at Langley.

The material from MFO which was prepared by the man there is sent by the Office of Security directly through Agency mail channels to The reports and material prepared by the MFO agents are sent by OS to the CI Staff of DDP in the Headquarters Building. The CI Staff is also the office which supplies

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OS with additions and deletions to the watch-list, which currently carries about 800 names.

The CI Staff has a special vault within its area where the Project material is handled. The personnel within this vault consists of a supervisor and four translator-analysts. Their job is to review all of the matter sent in by MFO, translate literally and completely those items which warrant detailed attention; summarize in English the contents of those items not requiring at the time more thorough processing; and index all names and addresses on those items not selected for summarization or translation.

The CI Staff prepares reports on their analyses of the material received and, according to its contents and the varied interests and requirements of its customers, sends some or all of the reports to its different customers. These customers primarily are the Federal Bureau of Investigation of the Department of Justice, the Security Research Staff in the Office of Security/CIA, and certain of the operating components within the DDP complex. Other offices within CIA or even elsewhere in the Government are given copies of pertinent reports when applicable, provided they have cleared personnel to handle and secure facilities for storage.

Special and specific clearance must be individually granted for anyone to have knowledge of and access to the Project and its products.

Volume of Project Material

As set forth earlier in this report, it is noted that the Project at Kennedy has available to it for inspection about 30 per cent of the out-air and 55 per cent of the in-air material. The discussion in the above sections shows why this is so. The controlling factors here are the 24-hour rule in delaying the mail, and the limited number of hours we work at the AMF. As a practical matter, this means that mail in either direction arriving at Kennedy on a weekday from mid-afternoon to after-midnight, and on the weekend, is not seen by our agents. Incidentally, for some reason, weekend mail is usually heavier in volume than weekday mail. A modification of these categorical statements on the mail we see should be made at this point. The strict rule is not applied equally to in-air and out-air. Actually, we are given a little more leeway in handling in-air than we are in handling out-air matter. The reason for this is that the out-air material has all originated within the United States, much

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of it right in the East Coast area close to Kennedy, and therefore any delay in its movement and dispatch is quickly discernible from postmarks and cancellations showing when it was mailed. The Post Office Department is continually making spot-checks of the outgoing matter to be sure it is handled promptly, and therefore the inspector who cooperates with us permits no undue delay in its movement. The same is not true with incoming items which may have originated anywhere within the Soviet Union, delayed in that country because of their procedures for inspection and processing, and then being dispatched to the USA where weather and other factors may delay it en route. Accordingly, we are not watched as closely on in-air and if we keep a few items even over the 24-hour period no objection is made. Also, the PO people will hold the in-air items a little longer for us, even some midnight arrivals being held till morning for our agents, whereas the out-items are sent on their way if we cannot handle them almost immediately. This helps explain the difference in the figures above of 30 and 55 per cent.

The number of items selected daily by the MFO agents at the AMF has varied somewhat from time to time. Last summer, for instance, we were processing (opening) and sending to Headquarters nearly 100 items a day, but the CI Staff found it could not handle that quantity with the manpower available for the operation. At the request of the CI Staff, the Project currently processes about 75 items a day, 4 days per week. This rounds out 300 items weekly and about 1,200 monthly, which the CI people find they can work efficiently and effectively. The daily take of watch-list items is about 35 or 40 pieces or roughly 50 per cent of the matter selected. [The balance of items are selected on an area or location basis, as indicated by the CI Staff and which is constantly changing as conditions dictate, and on a "knowledgeable basis" on the part of the MFO agents who exercise their good judgment as to what might be of interest to CI Staff, considering past experience and present world events.]

Without any appreciable increase in operating strength, it is apparent that the MFO agents could substantially augment the number of items they send in if CI Staff could handle them, basing the selection of additional items again on their judgment. It is also apparent that by re-organization of the operating procedures whereby we could inspect more of the incoming and outgoing mail than the percentages above show we are now doing, we would likely get many more watch-list items, maybe even, if we doubled the amount of mail inspected, get the full quota of 75 items daily entirely of such watch-list mail. This report, however, does not pursue that possibility, but confines itself to the Project as currently operated.

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Value of Project

During the course of this survey the officers in CI Staff and in responsible for their portions of the Project were queried as to the overall value of the Project. They were unanimous in stating they considered the Project to be of great value and worthy of continuation without any diminution, and if possible, to increase its take sometime in the future. especially hopes one day to resume processing for Secret Writing and to that end wants to retain all of its equipment in the MFO laboratory.



Address Reply to the
Division Indicated
and Refer to Initials and Number
MH:JMRogers:las
157-52-2174

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

March 24, 1978

TELEPHONE
(202) 739- 4792

Mr. A. Daniel Fusaro
Clerk, United States Court of
Appeals for the Second Circuit
United States Courthouse
40 Centre Street
New York, New York 10007

Re: Norman Birnbaum, et al. v.
United States of America
(C.A. 2, No. 77-6175)

Dear Mr. Fusaro:

Enclosed for filing are

10 copies of our ^{printed} brief*
10 copies of our appendix

in the above-captioned matter.

Yours very truly,

MORTON HOLLANDER
Chief, Appellate Section
Civil Division

Enclosures

cc: Herbert Jordan, Esquire
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

* A signed certificate of service appears on the last page
of the brief.

cc. Melvin L. Wulf, Esquire
Clark, Wulf & Levine
113 University Place
New York, New York 10003

Burt Neuborne, Esquire
40 Washington Square South
New York, New York 10012